



Volume 11 (2014) | ISSN 1932-1821 (print) 1932-1996 (online)
DOI 10.5195/taxreview.2014.22 | <http://taxreview.law.pitt.edu>

ARTICLES

MAINTAINING CLASS ACTIONS IN TAX CASES: WHY HAVE
FEDERAL LITIGANTS BEEN SO MUCH LESS SUCCESSFUL?

Charlotte Crane



This work is licensed under a Creative Commons Attribution-NonCommercial-No Derivative Works 3.0 United States License.



This journal is published by the [University Library System](#) of the [University of Pittsburgh](#) as part of its [D-Scribe Digital Publishing Program](#), and is cosponsored by the [University of Pittsburgh Press](#).

ARTICLES

MAINTAINING CLASS ACTIONS IN TAX CASES: WHY HAVE FEDERAL LITIGANTS BEEN SO MUCH LESS SUCCESSFUL?

*Charlotte Crane**

Class actions challenging tax collections and seeking refunds are commonplace to state tax administrators in many jurisdictions.¹ In stark contrast, however, class actions remain unusual in the various federal courts in which suits claiming that federal taxes have been illegally collected can be brought. This paper will attempt to offer some tentative explanations for this disparity.²

The disparity can be easily generalized. The federal courts have viewed their ability to interfere with tax processes as strictly a matter of limited jurisdiction under specific statutory provisions.³ Taking their cues

* Benjamin Mazur Summer Research Professor of Law, Northwestern University School of Law.

¹ See, e.g., *Alvarez v. Pappas*, 890 N.E.2d 434 (Ill. 2008) (holding that relief is still denied to taxpayers whose claims are time-barred); *Buckley Powder Co. v. State*, 70 P.3d 547 (Colo. App. 2002); *Dep't of Revenue v. Pepperidge Farm, Inc.*, 847 So. 2d 575 (Fla. Dist. Ct. App. 2003), *opinion withdrawn and substituted by* *Fuchs v. Pepperidge Farm, Inc.*, 2003 Fla. App. LEXIS 9012 (Fla. Dist. Ct. App. 2003).

² This paper does not address those aspects of class certification that are not unique to tax refund claims. For an overview of these other aspects of class actions in the tax refund context, see the briefs in *Brian Tech v. United States*, 271 F.R.D. 451 (M.D. Pa. 2012) (denying with a prejudice a challenge brought on behalf of all non-filers against the procedures established by the IRS for the refund of the telephone excise tax). Nor does it address the possibility of that, should the attitude of the federal courts toward class action suits for tax refunds change, different standards for class certification would emerge under the Federal Rules of Civil Procedure applicable in the district courts and the Rules of the Court of Federal Claims.

³ 28 U.S.C. §§ 1346, 1941 (2013) grants the district courts and the Court of Federal Claims jurisdiction to hear claims for tax refunds. The historic approach to the exclusivity of these specific remedies is addressed in *United States v. Bormes*, 133 S. Ct. 12 (2012).

from statutes that clearly were intended to limit their power in tax cases,⁴ the federal courts have been relatively unwilling to interpret these statutes in ways that expand taxpayers' remedies. State courts, on the other hand, seem far more likely to apply the same approach to tax cases as they would apply to any other civil case involving private parties, and as a result, feel far less hesitation in taking a more generous approach to taxpayers' remedies. Why?

The working hypothesis is simply that state tax systems have presented state courts with far more compelling invitations to exercise discretion in their handling of taxpayers' claims, both because state tax measures are enacted far closer to the boundaries of the state taxing powers invoked (leaving far more room for judicial interference with those measures) and because the remedial provisions made available by state legislatures are often entirely inadequate (again, inviting judicial interference). A state court's reaction to the lack of well-articulated remedies for taxpayers has frequently been to invent a remedy along common-law lines. Once such a court finds itself in the business of using its discretionary powers to allow suits that are not clearly authorized by statute, it is likely to be more willing to respond to taxpayers urging that the remedies be expanded beyond the limitations that would ordinarily have been included in statutory remedies, including the availability of class actions.

Federal courts have only rarely been presented with cases that seem to compel the use of nonstatutory remedies and the intrusion of the judiciary into the legislative realm that such remedies entail. Not only have the procedures for challenging taxes in general been more adequately articulated, but it is also clearly the case that the federal government has far less often introduced the kind of innovations in taxes that can easily lead to incomplete remedies.⁵ The federal government, furthermore, has many fewer constraints on its taxing power that would render its taxing instruments subject to judicial challenge. But these differences in the types of suits that could be brought do not completely explain the differences

⁴ 28 U.S.C. § 1341 (2013), *infra* note 27 and I.R.C. § 7421, *infra* note 45.

⁵ Although there have been several contrary situations, including the Harbor Maintenance Tax and the various taxes associated with the implementation of the New Deal, they have not ultimately resulted in a change in the approach taken by the courts involved. *See generally* I.R.C. §§ 4461–62; *see also infra* note 49.

between the reactions of the federal courts and those of the state courts to allow class actions.⁶

When the handful of such federal suits raising these issues is examined, another important factor seems to come into play. The federal courts, unlike the state courts, have been far more likely to view tax administration as something best left to the legislature and to the specific administrative processes the legislature has established. Some of this reluctance is manifested in the far more limited exercise of equitable powers in the courts in which federal taxpayers' challenges are most likely to be brought (that is, the Tax Court⁷ and the Court of Federal Claims) and in tax refund cases generally.⁸ As a consequence, the federal courts, ever mindful of sovereign immunity, have remained willing to find limits on their powers in language of the congressional acts that establish their jurisdiction over tax cases. More specifically, one of the most salient differences between the refund litigation in most state courts and the refund litigation in the federal courts historically has been the federal courts' respect for the administrative claim for refund as an opportunity to make a "determination of overpayment."⁹ Several recent federal cases, however,

⁶ The tentative suggestions outlined herein relate primarily to the attitudes of the courts involved regarding their own power and are not meant to be exhaustive. It may well be that the relative ease with which many taxpayers may challenge in the Tax Court federal taxes before they are paid explains a substantial amount of the differences observed. Other mechanisms for dealing with aggregation of claims that fall short of full class certification may take some of the pressure off federal courts. *See, e.g., Univ. of Utah v. United States*, 2008 WL 4534179 (D. Utah 2008). Both approaches may not be as appealing as full-fledged class actions to claimant's attorneys because they may not be accompanied by some of the mechanisms common to true class actions, including the creation of a common pool from which attorney's fees may be claimed.

⁷ *See* Leandra Lederman, *Equity and the Article I Court: Is the Tax Court's Exercise of Equitable Powers Constitutional?*, 5 FLA. TAX. REV. 357 (2001) (concluding that the Tax Court has no general equitable powers).

⁸ *See, e.g., Webb v. United States*, 66 F.3d 691 (4th Cir. 1995), *cert. denied*, 519 U.S. 1148 (1996). The result in *Webb* was endorsed by the Supreme Court on far more limited grounds in *United States v. Brockamp*, 519 U.S. 347 (1997), and altered on even more limited grounds by Congress in its enactment of I.R.C. § 6511(h). The premise of *Webb*, that equity plays no role in the disposition of tax refund claims except to the extent Congress has indicated that it should, remains. *See generally* Bruce A. McGovern, *The New Provision for Tolling the Limitations Periods for Seeking Tax Refunds: Its History, Operation and Policy, and Suggestions for Reform*, 65 MO. L. REV. 797 (2000).

⁹ This practice is generally associated with the holding of the Supreme Court in *Lewis v. Reynolds*, 284 U.S. 281 (1932).

may be read to downplay the importance of this aspect of claims for refund as a precondition to certification of a class.

The goals of this essay are relatively modest. It explores the contrast between reactions of state and federal courts to attempts to use class actions in tax refund suits, with particular emphasis on the doctrines used in handling these requests. It further speculates that the reasons for this contrast lie in the ease with which the various fora are accustomed to deviating from the roles assigned to them by the legislature in tax procedures more generally. Except as the courts themselves have hinted through their articulated justifications for their actions, the ultimate questions regarding the desirability of class actions in tax litigation are not addressed. In the first portion of the essay, the general nature of the developments in state courts regarding class actions in tax cases will be reviewed, and some reasons why these developments have come more easily in state courts will be offered. The second portion will consider the additional factors—including sovereign immunity and the limited powers of the federal courts to create exceptions to it—in most of the older federal court discussions. Finally, it will observe that this may change, as certain of the federal courts become more comfortable with treating tax cases as just another type of administrative claim against the federal government.

The general pressures on the state courts to expand remedies for taxpayers challenging previously paid taxes.

Litigants have been far more successful in bringing refund actions as class actions in the state courts than they have been in the federal courts. Fundamentally different starting points explain some of this difference. For instance, the federal courts' adherence to relatively strict approaches to sovereign immunity and the limited nature of the statutory waivers of sovereign immunity in tax matters has been a key factor in limiting the availability of class actions in federal courts.¹⁰ Although sovereign immunity has played a similar role in limiting the contours of suits for refunds against state revenue departments,¹¹ sovereign immunity is not

¹⁰ See text at note 46.

¹¹ See, e.g., *Pourier v. S.D. Dep't of Revenue & Regulation*, 778 N.W.2d 602 (S.D. 2010) (interpreting exhaustion requirements for the recovery of motor fuel excise taxes collected in violation of the federal rights of tribes as precluding class action certification, despite the State's acknowledgement of the rights of individuals to refunds); *Lick v. Dahl*, 285 N.W.2d 594 (SD 1979);

available *at all* as a defense for many *local* units of government.¹² As a consequence, state courts are accustomed to honoring all sorts of nonstatutory suits for money judgment against local units in other contexts. These state courts may find class actions against local units for overpayment of taxes a far easier exercise of their power than do federal courts, which do not regularly entertain such nonstatutory suits against the federal government.¹³

Additional differences lie in the nature of the institutional setting. State tax refund claims are often brought against a private party that serves as the collector/remitter of the tax (for instance, as is usually the case with retail sales taxes).¹⁴ Such suits may rely not only upon the statutory apparatus for

Charles v. Spradling, 524 S.W.2d 820 (Mo. 1975); Lacey Nursing Ctr., Inc. v. Dep't of Revenue, 905 P.2d 338 (Wash. 1995).

¹² Cf. Ardon v. City of Los Angeles, 255 P.3d 958 (Cal. 2011) (holding that state statute permitting claims against local units could not be read to prevent class actions). In *Ardon*, the court rejected the position taken by several lower California courts that the applicable statute anticipated only individual claims, e.g., Batt v. City & Cnty. of San Francisco, 65 Cal. Rptr. 3d 716 (Cal. Ct. App. 2007), and distinguished its own position in, that the statute permitting state refund actions precluded class actions, Woosley v. California, 838 P.2d 758 (Cal. 1992). In *McWilliams v. City of Long Beach*, 300 P.3d 886 (Cal. 2013), the California Supreme Court further held that local units in California could not establish their own individualized procedures that would result in precluding class actions; under the applicable state statute only another "statute" could impose such a requirement. Compare Jefferson Cnty Comm'n v. Edwards, 49 So. 3d 685 (Ala. 2010) (permitting a class action in a challenge to a county tax, although plaintiffs ultimately lost as a result of state legislative interference with remedial action), with Patterson v. Gladwin Corp., 835 So. 2d 137 (Ala. 2002), cert. denied sub nom. Millcraft-SMS Servs., L.L.C. v. Underwood, 537 U.S. 974 (2002) (dismissing a class action challenging the imposition of Alabama's franchise tax on out-of-state corporations for lack of compliance with the state's exhaustion requirements). In some states, courts seem willing to afford considerably more protection when claims for refund or other money payments are sought than when suits will merely interfere with revenue collection prospectively, e.g., Dan Nelson, Auto., Inc. v. Viken, 706 N.W.2d 239 (S.D. 2005) (permitting a declaratory judgment suit to proceed against the state revenue department).

¹³ In older cases, some state courts simply deferred to the legislative provision of remedy, without justifying their approach. See, e.g., Hansen v. County of Lincoln, 197 N.W.2d 651 (Neb. 1972), endorsed with respect to the income tax in *Boersma v. Karnes*, 417 N.W.2d 341 (Neb. 1988); Lilian v. Com., 354 A.2d 250 (Pa. 1976) (rejecting the taxpayers' assertion that equity alone justified the use of a class action when the amount of tax paid by any given taxpayer was too small to motivate litigation).

¹⁴ E.g., Getto v. Chicago, 426 N.E.2d 844 (Ill. 1981) (allowing class action against telephone service provider). Other states have blocked such suits against private party collectors on grounds, including the voluntary payment doctrine, that might not have been available against the state actor. Butcher v. Ameritech Corp., 727 N.W.2d 546 (Wis. App. 2006) (holding that a claim for refund of telephone excise tax was blocked by the voluntary payment doctrine as articulated by the Wisconsin Supreme Court blocked and, alternatively, under the doctrine of primary jurisdiction by the statutory administrative remedies provided by statute, even if these remedies preceded action as a class). Cf.

tax refunds, but also on federal and state law claims in contract or fraud.¹⁵ Courts that initially entertained these cases as if they were no different from law suits between other private parties may have come to the conclusion far more quickly that doctrines that would block similar actions against the governmental entities themselves are arbitrary.¹⁶ When state institutional arrangements have changed such that the state or municipal entity itself is the more appropriate defendant, the expansion of the court's power by permitting the class action to proceed against the state or municipal entity may seem a relatively small change.

Still other differences result from the variety of situations in which state courts have been tempted to enhance their ability to entertain litigation involving challenges to taxes beyond those remedies clearly provided by statute. Such situations can result from the simple fact that state legislatures frequently have hurriedly enacted taxes without providing adequate remedial schemes.¹⁷ When state legislatures or city councils impose taxes without clarifying the collection procedures to be used in administering those taxes, and therefore without also specifying the remedies that will be available to taxpayers, state courts are called upon to fashion an ad hoc remedial system. In such cases, state courts must either refuse to participate

Loeffler v. Target Corp., 93 Cal. Rptr. 3d 515 (Cal. App. 2d Dist. 2009), *review granted and opinion superseded*, 216 P.3d 520 (Cal. 2009) (still pending December 2013) (state sales tax case); Long v. Dell Computer Corp., 2012 R.I. Super. LEXIS 50 (R.I. Super. Ct. 2012) (dismissed on the merits). Such suits have been attempted in the federal context, but with very little success. *See, e.g.*, DuPont Glare Forgan Inc. v. Am. Tel. & Tel. Co., 428 F. Supp. 1297, 1303 (S.D.N.Y. 1977) (“[S]ection 7422(f) means precisely what it says[:] . . . plaintiffs may maintain a tax refund claim only against the government and not against collecting agents.”), *aff’d*, 578 F.2d 1367 (2d Cir. 1978); Brennan v. S.W. Airlines Co., 134 F.3d 1405, 1409 (9th Cir. 1998) (“It is well established that the IRC provides the exclusive remedy in tax refund suits and thus preempts state-law claims that seek tax refunds.”); Lehman v. USAIR Grp., Inc., 930 F. Supp. 912 (S.D.N.Y. 1996); Matthew v. RCN Corp., 2012 U.S. Dist. LEXIS 165030 (S.D.N.Y. 2012) (denying a claim for refund of the telephone excise tax in the absence of compliance with section 7422).

¹⁵ *See generally* Jack Trachtenberg, Jeffrey A. Friedman & Eric S. Tresh, *Applying False Claims Acts in State Taxation*, ST. TAX NOTES, May 7, 2012, at 373.

¹⁶ *See ABA Tax Section Transaction Tax Overpayment Model Act*, available at http://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/Uniformity/Sales_Use_Tax/ABA%20Model%20Act.pdf. *See also* Tim Gustafson, Jack Trachtenberg & Carley A. Roberts, *Between a Rock and a Hard Place: Third-Party Enforcement Actions*, ST. TAX NOTES, Oct. 1, 2012, at 49.

¹⁷ However, Congress is not totally immune from such behavior. *See* discussion of the Harbor Maintenance Tax *infra* note 49.

in the administration of the tax (a choice not taken in any of the twentieth century cases surveyed) or do their best to patch together a scheme under which such remedies are available.¹⁸ Frequently, these state courts will rely on catch-all jurisdictional provisions applicable either in the administration of other taxes or in other non-tax contexts. Courts that are accustomed to exercising a broad range of discretion in such circumstances¹⁹—and that have consciously embraced the exercise of equitable power in dealing with these cases—are far more likely to be comfortable with those exercises of equitable power that are involved in handling class actions.

Furthermore, state taxes (and state delegations of taxing power to local jurisdictions) are far more likely to run afoul of both federal and state constitutional limits on the power to tax. States and local governments have historically faced substantial fiscal pressures and therefore have been required to design tax instruments that approach the limits of their acknowledged power to tax. State courts have historically found facial constitutional challenges to such new tax instruments judiciable, and frequently have seen substantial benefits in entertaining such challenges relatively early in the history of the tax.²⁰ Under pressure to resolve the political uncertainty such new taxes may bring, state courts may have

¹⁸ See, e.g., *Anne Arundel Cnty. v. Halle Dev., Inc.*, 971 A.2d 214, 216, 235 (Md. 2008) (the court allowed class certification in a case involving impact fees while distinguishing its long standing holding that such certification would not be allowed in cases brought in the state tax court, *Hooks v. Comptroller*, 289 A.2d 332, 333–34 (Md. 1972)).

¹⁹ For instance, in Illinois, there is an alternative to exhaustion of traditional administrative remedies through the use of a “protest fund” procedure, now outlined by statute. Its history is outlined in *Chicago & Ill. Midland Ry. v. Dep’t of Revenue*, 349 N.E.2d 22, 22 (Ill. 1976) and in *NDC, LLC v. Topinka*, 871 N.E.2d 210 (Ill. App. Ct. 2007). Although there is some suggestion in lower court decisions that some Illinois courts have been willing to fashion similar procedures on their own when the statutory requirements have not been met, the Illinois Supreme Court seems recently to have squelched such efforts. See *Wexler v. Wirtz Corp.*, 809 N.E.2d 1240, 1247 (Ill. 2004) (denying use of the protest fund procedure to a retailer consumer who sought to bring a class action objecting to a liquor tax paid by a liquor distributor).

²⁰ See, e.g., *Tri-State Coach Lines, Inc. v. Metro. Pier & Exposition Auth.*, 315 Ill. App. 3d 179, *appeal denied by* 191 Ill. 2d 561, *cert. denied*, 532 U.S. 994 (2001). Indeed, in some states, legislatures themselves have established extraordinary procedures through which facial challenges to taxes can be brought. E.g., *Talbot v. Dent*, 48 Ky. 526, 528 (Ky. 1849) describing the provision adopted by the Kentucky legislature in 1836 which provided a special remedial provision for taxpayers in a particular limited situation. *But see Baertsch v. Minnesota Dep’t of Revenue*, 518 N.W.2d 21 (1994), applying an anti-injunction-type provision retroactively to require exhaustion of administrative remedies in challenging a new tax alleged to be in violation of the commerce clause.

actually encouraged some cases by signaling that innovative procedures, including class actions, may be available.

Even without fiscal pressure on the states that requires the invention of new tax instruments, changes in doctrines relating to the power of the States to tax interstate commerce, or to tax Indian tribes, may result in new challenges to old state taxes. For a brief period in the 1970's and 1980's, many challenges to state taxes were brought—both in state and federal courts—under 42 U.S.C. § 1983 even when state statutory remedies would clearly have been available.²¹ Although such section 1983 suits could not ordinarily be brought in federal courts after the Supreme Court's decision in *Fair Assessment in Real Estate Assn. v. McNary*,²² the state courts in general continued to entertain them. Given the relatively unconstrained nature of actions brought under section 1983, this trend in litigation brought many innovations to tax refund litigation, including more robust measures of attorney's fees,²³ longer statutes of limitation, less strictly enforced exhaustion requirements,²⁴ and interest computations other than those provided by statute, as well as the possibility of class action certification.²⁵

²¹ See generally William L. Taylor, *Section 1983 in State Court: A Remedy for Unconstitutional State Taxation*, 95 YALE L.J. 414 (1985); see also Note, *Clarifying Comity: State Court Jurisdiction and Section 1983 State Tax Challenges*, 103 HARV. L. REV. 1888, 1888-89 (1990).

²² 454 U.S. 100 (1981).

²³ The prominent motivation for such actions in state courts seems frequently to have been the potential for substantially greater attorney fee awards. In state courts, class actions for money damages frequently bring with them the possibility of the creation of a "common fund" from which attorney's fees will be paid, even before any payment is made to class claimants. Suits in state court under section 1983 probably seemed doubly attractive, given the availability of attorney's fees under section 1988, as well as under the various state theories. See, e.g., *Williard v. Pennsylvania*, 1996 U.S. Dist. LEXIS 8407, at *9 (E.D. Pa. June 17, 1996) (seeking class status, after a successful challenge had been made to the excessive collection of a retail sales tax, for a claim that the litigation at hand expedited the processing of individual refund claims and rendered the putative class a "prevailing party," so that attorneys fees under section 1988 could be awarded). Given the difficulties of establishing a common fund when federal tax revenues are involved, this motivation may be lacking. Of course, class certification may not always satisfy, if the measure of attorney's fees is not deemed sufficiently generous, see Bruce R. Braun & W. Gordon Dobie, *Litigating the Yankee Tax: Application of the Lodestar to Attorneys' Fee Awards in Common Fund Litigation*, 23 FLA. ST. U.L. REV. 897 (1996).

²⁴ For a survey of the procedural advantages sought by taxpayers during the time period in which such section 1983 suits were permitted, see Brief for Nat'l Conference of State Legislatures et al. as Amici Curiae Supporting Respondents, *Nat'l Private Truck Council, Inc. v. Oklahoma Tax Comm'n*, 515 U.S. 582 (1995) (No. 94-688).

²⁵ See, e.g., *Dep't of Revenue v. Kuhnlein*, 646 So. 2d 717 (Fla. 1994) (permitting with limited discussion use of class in suit brought both as suit for refund of under state procedures and as 1983

Ultimately, the usefulness of section 1983, even in state courts, was further reduced by the Supreme Court's decision in *National Private Truck Council, Inc. v. Oklahoma Tax Commission*.²⁶ That case imposed limitations on actions under section 1983 similar to those imposed by the Tax Injunction Act,²⁷ and related comity doctrines, even when those actions are brought in state courts.²⁸ It seems likely, however, that some of the procedural by-products of this litigation trend remain.

Finally, state courts are probably well aware that constitutionally questionable tax legislation for which taxpayers' remedies are not well specified poses considerable threats to state finances if the state courts themselves seem too insensitive to the constitutional problems. Such situations can result in a loss of state control over tax refund litigation and, in the extreme, over the state's own budget. Specifically, if state courts do not ensure that "adequate" remedies within the meaning of the Tax Injunction Act are available, the Tax Injunction Act itself and related doctrines of comity will not be available as defenses to challenges to state taxes under federal causes of action, brought either in federal or state courts.²⁹ Perhaps with the encouragement of state tax administrators, state

action, challenging impact tax on automobiles brought into the state), as discussed in Braun & Dobie, *supra* note 23.

²⁶ 515 U.S. 582 (1995).

²⁷ 28 U.S.C. § 1341 ("The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.").

²⁸ The Supreme Court has in recent years shown little inclination to find exceptions to the Tax Injunction Act. For a brief period, under *Hibbs v. Winn*, the Supreme Court was willing to permit suits that would not interfere with the actual collection of taxes to proceed, for instance, suits that challenge the granting of credits alleged to violate the Establishment Clause. 542 U.S. 88, 104 (2004). This position was substantially abandoned in the decision in a later phase of the same case, *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1449 (2011), finding that the challengers do not have standing. Although it is possible to imagine cases in which those challenging the favorable treatment of others would be seen as not disrupting tax collection while at the same time having the injury necessary to establish standing, there would be relatively few such cases. The Court's conclusion in *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012), that Congress did not intend that exercise of its taxing power to be covered by the Tax Injunction Act, seems unlikely to be repeated.

²⁹ State legislatures have acknowledged and responded to this same pressure. *See, e.g., In re Class Action Appeal of Mackey*, 687 A.2d 1186, 1189 n.6 (Pa. Commw. Ct. 1997) (indicating that the statute was amended to allow class-type procedures in response to a finding by the Third Circuit in *Garrett v. Bamford*, 538 F.2d 63 (3d Cir. 1976), that adequate remedies did not exist, and that therefore the TIA did not apply to the challenge as originally brought).

courts may have preferred to stretch their reading of state statutory remedies and of their own power rather than lose their ability to address challenges to state taxes before the challenges can be brought in federal courts. With respect to taxes for which these stretches have been made, there frequently are no statutory provisions imposing limitations on taxpayers' access to state courts. Without such statutory limits, the question whether certification of class actions is appropriate in cases seeking money judgments for improperly collected taxes appears little different from the same question in a case involving any other issue and any other defendant.

An additional force, unrelated to the habits developed by state courts in dealing with tax cases generally, may be further contributing to the likelihood of successful attempts to allow procedural innovations in cases involving claims relating to erroneously collected taxes, especially when the source of error lies in potentially unconstitutional features of the tax. In recent years, the courts in the United Kingdom and in Canada have unequivocally held that the imposition of an unconstitutional or otherwise invalid tax is a wrong that should be remedied regardless of many of the limits that might otherwise bar recovery of a tax refund.³⁰ Such courts have willingly embraced the idea that such "wrongful" collections should be remedied through actions for restitution, without regard for the limitations on statutory remedies available for the everyday overpayment of taxes. These restitution theories clearly implicate the abandonment of the relatively well-established contours of sovereign immunity that are still predominant in the United States.³¹ However, although this approach may have fueled litigants' arguments, it has not been embraced by either the state or federal courts in these contexts.³²

³⁰ The seminal case is *Woolwich Equitable Building Society v. Inland Revenue Comm'rs* [1993] A.C. 70 (H.L.) (appeal taken from Eng.), incorporating the position espoused in Peter Birks, *An Introduction to the Law of Restitution* (rev. ed. 1989). These views have since spread within the EU, as reflected in the essays collected in Steven Elliott, *Birke Haller and Charles Mitchell, Restitution of Overpaid Tax* (2013).

³¹ These doctrines appear to have been embraced by the *Restatement (Third) of Restitution and Unjust Enrichment* § 1 (2011). They are tempered somewhat, however, for application in the United States by the provision "[e]xcept to the extent that a different rule is imposed by statute" and by defenses that would justify limitations on relief to be granted based on the use of the funds.

³² The Supreme Court's willingness to view, for the purposes of argument, the taxpayer as similar to a plaintiff seeking restitution against a private party should not be taken as encouraging this line of reasoning, since the Court rather bluntly concluded that the similarity did not affect the way the Court

The doctrinal moves made by states that have allowed actions other than those strictly provided by statute.

Many states have statutory remedial schemes that provide refunds of state taxes that are very similar to those available against the federal government.³³ As do the federal statutes, these provisions require at least the timely filing of an administrative claim, and the timely filing in the designated court after the denial of the administrative claim.³⁴

In some states, the courts have approached these remedial provisions in ways that are very similar to the federal courts' implementation of statutory refund remedies; that is, these statutory provisions are viewed as the exclusive provisions through which sovereign immunity is waived and, as such, they must be interpreted literally. For instance, in *U.S. Xpress v. New Mexico*,³⁵ the state supreme court rejected the theory accepted by the state court of appeals that had allowed a class action to proceed bringing a Commerce Clause challenge to various over-the-road taxes, even though ordinary procedures had resulted in proportionate denials of refunds for the named plaintiffs. In so holding, the court relied heavily on the idea that it had no authority to deviate from the procedures prescribed by the legislature, even if these procedures might, in any particular case, be futile

would interpret the relevant statutes. Nevertheless, commentators invoke this aspect of the Court's opinion with some measure of hope that the comparisons with restitution will gain more traction. *See, e.g.,* THEODORE PEYSER, REFUND LITIGATION 631-2d T.M. A-3 n.12 (BNA 2006). It also seems clear that even when class certification is available in claims for tax refunds, courts have difficulty using the same open-ended approaches to plaintiffs' recovery that they might use in other contexts. For instance, in their survey of awards to plaintiffs in class actions, Theodore Eisenberg and Geoffrey P. Miller, found that in none of the six tax cases were incentive awards made to representative taxpayers, Theodore Eisenberg & Geoffrey P. Miller, *Emerging Issues in Class Action Law: Incentive Awards to Class Action Plaintiffs: An Empirical Study*, 53 UCLA L. REV. 1303, 1323 (2006).

³³ Most claims relating to taxes are brought under 28 U.S.C. § 1346(a) (2013), which grants the district courts (and 28 U.S.C. § 1491 (2013), the Court of Federal Claims) jurisdiction to hear claims for tax refunds. Such actions are generally limited by I.R.C. § 7422, which outlines the preconditions for a federal suit to collect tax refunds, including the requirement that an administrative claim be filed with the Internal Revenue Service. The Supreme Court reinforced the exclusivity of that provision and its exhaustion requirement when it rejected the claim in *United States v. Clintwood Elkhorn Mining Co.*, 553 U.S. 1 (2008) that certain types of tax impositions can create constitutional claims that are cognizable without regard to statutory limitations.

³⁴ *See, e.g.,* Nutbrown v. Munn, 311 Ore. 328 (1991), *cert. denied*, 502 U.S. 1030.

³⁵ *U.S. Xpress, Inc. v. New Mexico Taxation & Revenue Dep't*, 136 P.3d 999 (N.M. 2006), *rev'g* 116 P.3d 846 (N.M. Ct. App. 2005).

or otherwise serve no obvious purpose.³⁶ There was no attempt in this opinion, however, to defend these specific requirements, whether on grounds that the state deserves notice of the threat to its revenue or on grounds like the need for a refund in order to make the “determination of overpayment” concerns that have influenced federal courts.³⁷

In other states, however, courts have been willing to treat the conditions ordinarily required before when such refund actions can be brought as “vicariously” or “virtually” satisfied if they have been satisfied by the named plaintiff of an otherwise appropriate class.³⁸ For instance, in *Arizona Department of Revenue v. Dougherty*,³⁹ a class was allowed to proceed in a Commerce Clause challenge to a partial deduction for

³⁶ *Id.* at 1003.

³⁷ Similarly, in *District of Columbia v. Craig*, 930 A.2d 946 (D.C. 2007), *cert. denied*, 554 U.S. 905 (2007) the court refused to allow a class action challenge on equal protection grounds to property tax assessments, noting that statutory requirement of refund claim was a jurisdictional requirement, not the sort of judicial doctrine for which exceptions, including futility, could be made. The court noted the federal jurisdictional requirement, but did not explore its implications. In *Ziegler v. Ind. Dep’t of State Revenue*, 797 N.E.2d 881 (Ind. T.C. 2003), the court allowed a class action to proceed, but refused to make an exception to the legislatively required exhaustion requirement for any taxpayer, given that the legislature had specifically provided in Ind. Code § 6-8.1-9-7 (2013), that the requirement be required of all class members. Arkansas cases involving administrative interpretations claimed to be merely erroneous rather than unconstitutional generally take this approach. *See, e.g.*, *State Dep’t of Fin. & Admin. v. Staton*, 942 S.W.2d 804 (Ark. 1996) (in a suit challenging a state sales tax upholding the requirement of protest and claim for refund on sovereign immunity grounds, justified in part by need for notice regarding revenues in general fund); *State Dep’t of Fin. & Admin. v. Tedder*, 932 S.W.2d 755 (Ark. 1996) (rejecting over strong dissent an earlier case permitting class actions on grounds that the sovereign immunity argument was not presented to the court); *Pledger v. Bosnick*, 811 S.W.2d 286 (Ark. 1991). A special provision of the Arkansas Constitution, however, has been held to allow direct suits for “illegal exactions,” including illegal taxes, and that such suits are automatically class actions. *See, e.g.*, *Carson v. Weiss*, 972 S.W.2d 933 (Ark. 1998) (permitting a challenge by an out-of-state resident to the apportionment of personal income tax when administrative refund procedures had not been followed) and ordinarily taxpayers may not opt out of such “illegal exaction” suits. *Worth v. City of Rogers*, 89 S.W.3d 875 (Ark. 2002).

³⁸ Most jurisdictions recognize that there are two types of conditions involved here, and that sometimes both are loosely referred to as “exhaustion of administrative remedies.” The first is a matter of judicial discretion. The second is a matter of jurisdiction. Although virtually all of the courts that deny class certification completely, or allow it only for those who have satisfied such conditions, treat waiver of sovereign immunity as a jurisdictional matter, they vary in whether they refer to the doctrines involved as “exhaustion.” In state cases, conditions are more likely to be viewed as of the first type when the taxes are those local units, which in general do not enjoy sovereign immunity and of the second type when the taxes are state taxes.

³⁹ *Ariz. Dep’t of Revenue v. Dougherty*, 29 P.3d 862 (Ariz. 2001).

dividends received. The filing of the case tolled the statute of limitations for those putative class members who could have, as of that date, filed timely administrative claims, but it did not revive the statute for those who could not have so filed. Footnote 5 indicates that the state attempted to invoke federal precedents based on the similarities of Arizona law with federal law, but the court rejected the comparison. Similarly, in *Barnes v. City of Atlanta*,⁴⁰ a class was certified of all lawyers subject to a city occupational tax that was held to be unconstitutional as a regulation of lawyers. In *Barnes*, the refund claim prerequisite was treated as having been satisfied for all class members by the actions of the named plaintiffs.⁴¹ The Georgia court seems to have viewed the statutory exhaustion requirement as primarily a matter of notice to the affected taxing jurisdiction.

The trend in favor of class actions in state courts is not uniform. Indeed, in some states, courts that previously would have been offered as examples of those likely to look favorably upon class actions now seem to be attempting, with mixed results, to return to relatively strict enforcement of the refund remedies outlined by statute.⁴² Nevertheless, courts, and more importantly, the plaintiffs' attorneys that appear before them, have in many

⁴⁰ *Barnes v. City of Atlanta*, 637 S.E.2d 4 (Ga. 2006).

⁴¹ *Id.* In response to the *Barnes* case, this result was reversed by action of the Georgia legislature. See *Sawnee Elec. Membership Corp. v. Georgia Dep't of Revenue*, 608 S.E.2d 611 (2005).

⁴² California has a history of issuing decisions of this type. Its courts in the 1970s and early 1980s certified class actions in tax when a named plaintiff had satisfied the administrative requirements of the refund statute, even if there were no indication that other class members had. In so doing, the courts were willing to stretch the interpretation of Article XIII, section 32 of the California constitution, which directs that tax refund suits can be pursued only "in such manner as may be provided by the Legislature." See, e.g., *Schoderbek v. Carlson*, 170 Cal. Rptr. 400 (1980) (property tax); *Lattin v. Franchise Tax Bd.*, 142 Cal. Rptr. 130 (1977) (income tax); *Santa Barbara Optical Co. v. State Bd. of Equalization*, 120 Cal. Rptr. 609 (1975) (sales tax). The California legislature reacted by requiring a written authorization by each taxpayer sought to be included in the class, signed by each taxpayer or taxpayer's representative, and stating the specific grounds on which the claim is based. See Patrick G. Woosley, *California High Court's Crackdown on Refund Claims: A Wall of Procedure?*, 4 ST. TAX NOTES 970 (1993). The California courts appear to be split regarding the appropriate approach when such legislative conditions have not been specified. Compare *County of Los Angeles v. Superior Court*, 159 Cal. App. 4th 353, 71 Cal. Rptr. 3d 485 (Cal. Ct. App. 2008) (affirming certification of class action challenging utility user taxes), with *Batt v. City and County of San Francisco*, 155 Cal. App. 4th 65, 65 Cal. Rptr. 3d 716 (Cal. Ct. App. 2007). See Jennifer Carr, *A California Class Claim Dispute*, 2009 STT 12-10. See also *Ziegler v. Ind. Dep't of State Rev.*, 797 N.E. 2d 881, 886 (Ind. T.C. 2003) (enforcing the statutory refund procedure and the abolishment of the class action in tax litigation under a statute apparently prompted by a case allowing such suits, *Clark v. Lee*, 406 N.E.2d 646 (Ind. 1980)).

states become accustomed to fashioning refund remedies not clearly specified by statute.

The vulnerabilities in the federal obstacles to class actions in taxpayer refund litigation.

The obstacles to litigation involving the administration and collection of federal taxes have, for the most part, limited the opportunities in which a request for certification of a class would be plausible. Both the district courts and the U.S. Court of Federal Claims and its predecessors have held firm in denying class status.⁴³ Nevertheless, two trends seem likely to increase the number of situations in which taxpayers and their representatives may request class certification. First, Congress may find itself needing to create tax instruments and it may continue to be relatively unconcerned with fixing irregularities in tax administration as they arise.⁴⁴ Second, an increasing number of the federal courts have referred to the claim for refund process as nothing more than a notice requirement. Although many of these references may simply reflect the fact that the particular reference to refund claims did not require a discussion of the nature of the process, others cannot be so easily dismissed.

⁴³ The relationship between inadequate statutory remedies and the vulnerability of tax schemes to unusual judicial reactions is well exemplified by the litigation over the refund procedure outlined by the IRS when it discontinued collection of the telephone excise tax. The failure of Congress to provide an appropriate mechanism for this discontinuance forced the IRS to attempt to fashion an administrative approach that, in a rough justice sort of way, would provide most consumers some semblance of a refund. In doing so, the IRS established procedures whereby its personnel were bound which were soon challenged as failing to conform to the requirements of the Administrative Procedure Act. In *Cohen v. United States*, 650 F.3d 717 (D.C. Cir. 2011), the court was willing to treat the suit as a challenge to the procedures established by the IRS, and not as a suit for refund, and allowed the suit to proceed. The status of class claims for money, as opposed to claims to vacate the offending administrative action remains unclear. At least one court in a related case has refused to certify a class. See *Tech v. United States*, 271 F.R.D. 451 (2010). And in *Matthew v. RCN Corp.*, 2012 U.S. Dist. LEXIS 165030 (2012), the district court concluded that the remedy provided by section 7422 against the government was exclusive and therefore no remedy, class or otherwise, was available against the communications provider/collector of the excise tax. The Court of Federal Claims in *Radioshack Corp. v. United States*, 105 Fed. Cl. 617 (2012) similarly denied class certification on the traditional failure to prove satisfaction of section 7422 grounds.

⁴⁴ The individual mandate at issue in *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012), is evidence of the growing need for Congress, as a result of budget and other political pressures, to invent new revenue sources.

Most federal courts have consistently held that suits seeking injunctions and declaratory judgments to block the prospective application of federal taxes are barred by the Tax Anti-Injunction Act⁴⁵ and the tax exception to the Declaratory Judgment Act.⁴⁶ The courts' willingness to apply these restrictions relatively strictly has limited the circumstances in which it would otherwise be natural to seek class certification in a facial challenge to federal taxes.⁴⁷

Those remaining challenges that are not barred by the Anti-Injunction Act⁴⁸ because they seek only a money judgment are barred by sovereign immunity unless it has been waived. With very limited exceptions, federal courts have viewed the remedy provided under I.R.C. § 7422 as the exclusive means of recovering improperly paid amounts of federal internal revenue taxes. In almost all cases involving federal income taxes, courts have held that the provisions of section 7422 are the only provisions through which Congress has waived sovereign immunity for claims seeking refund of amounts paid as taxes in the federal district courts and in the court of claims.⁴⁹

⁴⁵ I.R.C. § 7421(a).

⁴⁶ 28 U.S.C. § 2201 (2012).

⁴⁷ *But see* *Sorenson v. Sec'y of the Treasury*, 752 F.2d 1433, 1435 (9th Cir. 1985), *aff'd*, 475 U.S. 851 (1986), in which the taxpayers appear to have carefully limited their suit to one for declarative relief regarding the propriety of the use of the tax-intercept provisions in the context of earned income credits. The Supreme Court's opinion, affirming the decision on the merits against the taxpayer, noted that the government had made procedural objections in the courts below, but did not address these procedural issues. In *Oatman v. IRS*, 34 F.3d 787, 789 (9th Cir. 1994), the Ninth Circuit again allowed a suit to proceed as a class action, when the provisions of another federal statute suggested that a judicial relief other than a payment or an injunction of tax collection itself could be granted.

⁴⁸ I.R.C. § 7421(a) (“[e]xcept as provided . . . no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed”).

⁴⁹ However, when section 7422 or another specific provision is not applicable, courts have been far more flexible in fashioning remedies. For instance, in the constitutional challenges to the Harbor Maintenance Tax, no protest remedy was available under section 1581(a), so no protest needed to be filed and suit was allowed to proceed under section 1581(i), a provision which anticipates the exercise of considerably more judicial discretion in the fashioning of procedures and the nature of remedies. *Thomson Consumer Electronics v. United States*, 247 F.3d 1210, 1215 (Fed. Cir. 2001), *cited with approval in* *Totes-Isotoner v. United States*, 594 F.3d 1346, 1350–51 (Fed. Cir. 2009).

The Supreme Court's opinion in *United States v. Clintwood Elkhorn Mining Co.*,⁵⁰ is only the most recent of the Court's statements discouraging taxpayers from attempting to find other ways to challenge taxes already paid. In *Clintwood Elkhorn*, the Court refused to allow challenges in the Court of Federal Claims under the Tucker Act for repayment of taxes that had been paid as an excise tax even though that same tax as applied to a different taxpayer had been held, after the date of payment and by a different court, to be an invalid tax on exports.⁵¹ The taxpayer had sought to develop a doctrine that would allow section 1983 suits when a taxpayer's challenge involved taxes collected in violation of the Export Clause, by analogy to the doctrine that would allow direct suits for uncompensated takings.⁵²

In short, the federal courts have not had much experience dealing with incomplete or inconsistent remedial provisions.⁵³ Nor have the modern federal courts faced many cases in which constitutional challenges with substantive merit might have tempted them to stretch the statutory procedural rules that constrain their power, invoking their equitable powers to re-shape the available remedies. The federal courts, furthermore, have

⁵⁰ 553 U.S. 1 (2008).

⁵¹ *Id.* at 14.

⁵² *Id.* at 6.

⁵³ The limited exceptions include the decisions of the International Court of Trade described in *supra* note 49, expansively interpreting section 1581(i) to allow suits for refunds even when other remedies are available. *See, e.g.*, *United States v. U.S. Shoe Corp.*, 523 U.S. 360 (1998) (HMT as tax on exports); *Totes-Isotoner Corp. v. United States*, 580 F. Supp. 2d 1371, 1374 (Ct. Int'l Trade 2008) (equal protection challenge on classification of men's leather gloves different from women's, explicitly distinguishing Elkhorn as impinging on section 7422). *See generally* James R. Cannon, *2008 Year in Review of Decisions Issued by the U.S. Court of International Trade: Clarifying the Scope of § 1581(i)*, 41 GEO. J. INT'L L. 83 (2009). Although a statutory scheme was arguably available, the innovation involved in the handling of the Telephone Excise Tax litigation arguably presents the federal courts with similar novel questions regarding the scope of their power in the tax refund litigation. The Telephone Excise Tax litigation, described in *supra* note 43. The taxes included in the Agricultural Adjustment Act, 48 Stat. 31 (1933), presented the state and federal courts with a range of procedural issues relevant to this inquiry. The taxes themselves were held invalid by the Supreme Court in *United States v. Butler*, 297 U.S. 1 (1936), leaving the collectors of those taxes and their customers to sort out their remedies. State courts generally did not respond favorably to efforts to aggregate these claims under equitable principles. *Smith v. Sparks Milling Co.*, 39 N.E.2d 125 (Ind. 1942) (holding that plaintiff purchasers recovery was in contract and not based on equitable principles, and that the proof necessary for such claims were not the appropriate basis for a class action); *Thorn v. George A. Hormel & Co.*, 289 N.W. 516 (Minn. 1939) (similar, especially when only contractual no equitable theories were pressed).

held that the provisions of section 7422 must be strictly adhered to before a suit can proceed. These requirements include payment in full⁵⁴ and the filing of a timely claim for refund.⁵⁵ Federal courts have been leery of allowing aggregation of claims brought under section 7422, since proof of the satisfaction of such requirements is highly fact-specific for each taxpayer.

These aspects of the section 7422 requirements are sometimes referred to in a somewhat shorthand fashion as the equivalent of the more general requirement of “exhaustion” of administrative remedies.⁵⁶ In the context of federal tax refund cases, two purposes have been attributed to the “claim for refund” requirement. First, the requirement is viewed as putting the government on notice that the tax is disputed, and the revenue associated therewith may not be permanently available.⁵⁷ Second, the requirement allows the government to determine whether the predicate to a refund, the overpayment of taxes, actually exists for the year in question.⁵⁸ The notice

⁵⁴ *Flora v. United States*, 357 U.S. 63 (1958), *aff’d on reh’g*, 362 U.S. 145, *reh’g denied*, 362 U.S. 972 (1960).

⁵⁵ *United States v. Brockamp*, 519 U.S. 347 (1997), *superseded by statute*, I.R.C. § 6511, *as stated in Cooper v. C.I.R.*, 718 F.3d 216 (3d Cir. 2013).

⁵⁶ *See, e.g., Wyodak Res. Dev. Corp. v. United States*, 637 F.3d 1127 (10th Cir. 2011) (in denying suit for refund of reclamation fees, held not to be an “internal revenue tax,” upholding the importance of satisfying section 7422 as a precondition to jurisdiction under section 1346, but concluding that “the provisions work together to require that all tax refund claimants . . . must first exhaust their administrative remedies with the Secretary of the Treasury”); *Bruecher Found. Servs. v. United States*, 383 Fed. Appx. 381 (5th Cir. 2010) (citing *Mallette Bros. Construction Co. v. United States*, 695 F.2d 145 (5th Cir. 1983) (agreeing with the government that taxpayer’s omissions in a refund claim precluded presentation at trial, even if the government in examining the refund claim may have considered the issue sought to be raised)).

⁵⁷ This purpose is closely related to the more general common-law requirement that “protest” must have been made as an amount was paid, otherwise no refund will be available of payments deemed to be “voluntary” payments. The protest requirement is no longer applicable in actions brought under section 7422. In *George Moore Ice Cream v. Rose*, 289 U.S. 373 (1933), the Supreme Court held that revisions to section 1014 of the Revenue Act of 1924, section 3226 of the Revised Statutes, had substituted the claim for refund for the requirement of protest contemporaneous with payment, even for payments made before the revisions. This does not mean, however, that it should not be required in those limited cases in which a suit for money judgment is allowed to proceed outside of section 7422. For an overview of the protest requirement in the history of tax refund litigation, see Charlotte Crane, *Protesting to Preserve a Right to a Refund*, 1999 TNT 138–64 (focusing on the remedies available to those challenging the Harbor Maintenance Tax in the Court of International Trade).

⁵⁸ *Lewis v. Reynolds*, 284 U.S. 281, 283 (1932).

justification for the refund claim has received considerably more attention, both in the secondary literature⁵⁹ and in the more recent judicial decisions.⁶⁰ Courts that focus only on the “notice” aspects of the refund-claim requirement are far less likely to find the possible failure to meet that requirement as an obstacle to recovery. Thus, taxpayers may be allowed to proceed when a refund claim would have been “futile,” given the positions taken by the revenue agency in the past. Similarly, if “notice” is all that is at stake in the refund-claim requirement, a court is far more likely to let one taxpayer’s satisfaction of the refund-claim requirement represent “virtual exhaustion” or “vicarious exhaustion” of the requirement for an entire class.

In the older cases in which class certification has been denied, the federal courts seem to have understood the extent to which something more than mere notice was at stake. Indeed, in one case, the court not only highlighted the potential for an audit or audit-like response to a claim for refund, but also emphasized the taxpayer specific inquiry that is related to the shifting of the burden of proof in the refund litigation itself.⁶¹ The more recent opinions,⁶² while holding for the government that section 7422 is the exclusive route for refunds, have on occasion not made any reference to the

⁵⁹ See, e.g., PEYSER, *supra* note 32 (the variance defense “is predicated on the purpose of the claim for refund, i.e., to give notice to the IRS”).

⁶⁰ E.g., *Matthew v. RCN Corp.*, 2012 U.S. Dist. LEXIS 165030 (S.D.N.Y. 2012). *But see* *BCS Fin. Corp. v. United States*, 118 F.3d 522, 525 (7th Cir. 1997) (in rejecting a claim that the informal refund claim doctrine should apply when the taxpayer could at best be viewed as having made a claim with respect to a different tax year, “because by claiming a refund for 1984 BCS would have been reopening its return for that year for the IRS to claim deficiencies . . . and who knew what skeletons lay in the 1984 closet?”). *Cf.* *Oregon Metallurgical Corp. v. United States*, 12 Cl. Ct. 447 (1987), *vacated*, 1987 U.S. Cl. Ct. LEXIS 241 (1987) (rejecting a variance defense when the government had full awareness of the theory in the varied claim).

⁶¹ E.g., *Saunooke v. United States*, 8 Cl. Ct. 327 (Cl. Ct. 1985); *Lipsett v. United States*, 37 F.R.D. 549 (S.D.N.Y. 1965).

⁶² This omission does not appear in some of the earlier cases denying class certification in the Court of Claims—e.g. *Dysart v. United States*, 169 Ct. Cl. 276 (1965). On the other hand, as forceful as the court’s rejection of the possibility of a class action was in *McConnell v. United States*, 295 F. Supp. 605 (1969), the opinion only offered relatively unspecific justifications:

It is vital to the functions of government that taxes be collected promptly and if errors are made, that they be expeditiously corrected. To this end the statute requires the taxpayer to make a timely charge of overpayment with grounds therefor, that the government may make investigation and refund the amount due, if any, without being subjected to the delay and expense of litigation * * *. *Kales v. United States*, C.C.A. 6th affirmed (1941), 314 U.S. 186.

“determination of overpayment” aspect of the claim for refund process. The Supreme Court in *Clintwood Elkhorn Mining*, for instance, simply quoted *United States v. Felt & Tarrant Mfg. Co.*,⁶³ for the observation that the refund claim was necessary “to advise the appropriate officials of the demands or claims intended to be asserted, so as to insure an orderly administration of the revenue,” to provide that refund claims are made promptly, and to allow the IRS to avoid unnecessary litigation by correcting conceded errors.”⁶⁴ The Court made no reference to the second justification for strictly requiring a refund claim; the need to allow the government to make the “determination of overpayment.” This omission is readily understandable in the *Clintwood Elkhorn* case itself, since delving into the “determination of overpayment” question would raise questions about the nature of the offsets that would be available for the mining tax imposed under I.R.C. § 4121(a)(1). If this aspect of the case had not been briefed and was not clearly necessary to the logic of the opinion, the author of the opinion might well have felt that it was simply better ignored.

But other federal courts have also overlooked the “determination of overpayment” rationale, even as they have rejected taxpayers’ attempts to expand their jurisdiction in ways that create tension with section 7422 and its requirements. For instance, in *Strategic Hous. Fin. Corp. v. United States*,⁶⁵ the court considered whether a direct suit would lie for a municipal bond issuer seeking the return of an arbitrage penalty. The court relied on *Clintwood Elkhorn* and on a relatively literal approach to statutory construction when it simply observed: “In other words, a party seeking to recover any internal-revenue tax, penalty, or sum from the United States must pursue and exhaust its administrative remedies pursuant to the IRS’s regulations prior to filing a complaint in federal court.”⁶⁶ It made no mention of the “determination of overpayment” justification for section 7422’s requirements—although here the possibility that any such offsets might have existed was not great.

⁶³ *United States v. Clintwood Elkhorn Mining Co.*, 553 U.S. 1, 11 (2008) (quoting *United States v. Felt & Tarrant Mfg. Co.*, 283 U.S. 269, 272 (1931)).

⁶⁴ *Id.* at 11–12.

⁶⁵ 608 F.3d 1317 (Fed. Cir. 2010).

⁶⁶ *Id.* at 1324.

Perhaps more troublesome is the extent to which the court in *Fisher v. United States*⁶⁷ cites the older precedents in which the “determination of overpayment” was crucial to the courts’ analysis, but then dismisses them as merely indicative of the now rejected position of the Court of Federal Claims and its predecessors that class actions may have been “generally disfavored.”⁶⁸ The court’s only statement addressing the “determination of overpayment” aspect of the refund claim requirement seems to at once reject it out of hand and misapply it:

The fact that defendant could audit the tax returns of individual class members to determine whether any previously undiscovered deficiencies should be offset against potential refunds standing alone is insufficient to establish that individual issues predominate in the litigation. For class certification to be proper, it is only necessary that common questions predominate, not that they be dispositive of the entire action for every class member. . . .

[All plaintiffs share] the common issue of the correct tax basis of stock or cash received in demutualization transactions. Regardless of individual offsets, resolution of [the issue regarding the possibility that the taxpayers had basis in their equity interests and the means of determining this basis] will substantially affect all prospective plaintiffs’ claims. Furthermore, if defendant were to prevail on the issue [regarding basis] . . . the issue of offsetting deficiencies against refunds for individual class members would be irrelevant because the prospective class members would not be entitled to refunds at all.⁶⁹

Although it is not entirely clear from this language, it seems likely that its author did not understand the extent to which the “offsets” that could have been taken into account in the processing of a claim for refund would include more than the particular offset resulting from the basis question at issue. Indeed, under the ordinary practices of the government the “determination of overpayment” doctrine, could in some cases have involved adjustments in the taxpayers’ favor.

Similarly, in cases in which federal courts have been willing to expand taxpayers’ remedies, the “determination of overpayment” justification seems to have been given short shrift. Although in the very short pleadings

⁶⁷ 69 Fed. Cl. 193 (Fed. Cl. 2006) (denying without prejudice the motion to certify a class and providing a roadmap for future movants).

⁶⁸ *Id.* at 197–98.

⁶⁹ *Id.* at 204.

addressing the propriety of class certification in *Appoloni v. United States*,⁷⁰ the “determination of overpayment” point was raised, and the court nevertheless certified a class that included only those that had filed for a refund. It overlooked the fact that, given the way other courts have interpreted the “determination of overpayment” requirement, a group of taxpayers will not present “common” issues that “predominate.”⁷¹

In sum, the formalistic concerns that have formerly prevailed when disputes arise because the federal government has acted as a tax collector seem to be becoming less important. As a result, the federal courts’ comfort with treating the federal government as just another defendant susceptible to having claims against it determined according to general equitable terms is growing. Should the federal courts continue to become more comfortable with treating the federal government as “just another defendant” in tax cases, they may follow the example of the many state courts that have permitted equitable devices, including class actions, in tax cases.

⁷⁰ 218 F.R.D. 556 (W.D. Mich. 2003), *modified*, 219 F.R.D. 116 (2003), *aff’d*, 450 F.3d 185 (2006). A similar, rather perfunctory, approach was taken in another case involving the same issue. *See Klender v. United States*, 218 F.R.D. 161 (E.D. Mich. 2003), *modified*, 218 F.R.D. 551 (2003), *rev’d sub nom. Appolini*.

⁷¹ It is unclear whether the “determination of overpayment” issues embedded in *Appolini* and *Klender* can be distinguished because those cases involved FICA taxes, which, at least in some contexts are treated as divisible taxes and therefore the “determination of overpayment” inquiry might be different.