

An Interview with Patrick Mullarkey, Acting Deputy Assistant Attorney General, U.S. Department of Justice, Tax Division

Patrick Mullarkey was appointed the DOJ Tax Division's acting deputy assistant attorney general (DAAG) for civil trial matters in January 2010. In that role he oversees the litigation functions and other operations of the six regional Civil Trial Sections, the Court of Federal Claims Section, and the Office of Civil Litigation. Prior to being appointed acting DAAG, Mullarkey served as chief of the Civil Trial Section, Northern Region, for over 30 years. He received his B.S. in accounting from Marquette University and his J.D. and LL.M in taxation from Georgetown University.

FBA: Where did you start your career, and how did you come to work at the DOJ Tax Division?

PM: After graduating from college, I worked for a summer as an auditor for the Wisconsin Department of Taxation (WDOT) reviewing state tax returns, about 300 per day. I then attended law school at Georgetown University, and joined the *Law Review*. When it was discovered that I had worked as an auditor for the WDOT, I became the tax person on the *Law Review*. Paul Dean, then the dean of the law school, was an estate tax expert, and I had the opportunity to turn a couple of his speeches into an academic article. This experience first caused me to consider a career in tax law.

I also was drawn to litigation and wanted to be like Perry Mason, so I clerked for a senior district court judge who handled only civil jury trials. Observing these trials gave me vicarious trial experience. I was also able to take most of the credits necessary for an LL.M in tax law at night at Georgetown during my clerkship. It helped to have written an article for the dean because he let me take an extra-heavy course load. One of my housemates worked at DOJ. He convinced me to join a trial section in the DOJ Tax Division, which I did in 1966, at the end of my clerkship.

I considered going into private practice after completing my four-year commitment to the Tax Division. But, at that time, an attorney in private practice against whom I had litigated a case asked me to help him get a job at the Tax Division. He said that the case we had together was the most interesting case he had worked on. I told him that



I had fifty of those cases. That, and the fact that I was a bachelor at the time, lived for virtually nothing in a house with a bunch of guys, and banked half my paycheck, pretty much convinced me to stay put.

It was unusual in those days for anyone to stay beyond the four-year commitment. It was as though the job was a four year course in litigation which, upon graduation, one left for the big bucks. Today that is not as true. Many of our attorneys elect to stay because they see their classmates from law school in private practice still writing memos for partners five or six years into practice, while our attorneys are handling those cases against the partners. In many respects, the Tax Division offers a higher-quality career than private practice, even though there is less financial reward.

FBA: How have your responsibilities at the Tax Division evolved over your career? Also, how has the Tax Division changed?

PM: When I joined the Tax Division, three sections handled solely tax refund claims arising in different geo-

graphical areas, one section handled refund cases before what is now the Court of Federal Claims, and one section focused on general litigation, which included bankruptcy, summons enforcement, collection and everything that wasn't refund work, for the whole country. I worked for 10 years as a trial attorney in a tax refund section before a reorganization in 1976 in which the general litigation and geographical refund sections were abolished and four geographical sections were formed to handle all cases, refund and general litigation, arising in a geographical area. I was a trial attorney in one of those sections for about a year before becoming an assistant section chief. After about a year, I was appointed the division's special litigation counsel. Shortly after that, I was appointed chief of one of the trial sections, a position which I occupied for over 30 years.

Becoming a section chief was a bit of a shock because, even after the reorganization, I previously had handled primarily refund suits. Suddenly, I had general litigation responsibilities involving lien, levy, and bankruptcy issues. These general litigation issues required more creativity and overall legal knowledge than the substantive tax issues, which could be more easily compartmentalized. Fortunately I had a great teacher in my assistant chief, Jerry Fridkin, who had spent his career in general litigation. My favorite aspect of working as a section chief was reviewing and getting involved in individual cases.

The overall work handled by the Tax Division has changed during my tenure. The 1977 reorganization was caused by the fact that it became evident by the 1970's that the number of tax refund cases was declining, while general litigation work was increasing. A general litigation attorney might have a docket of over 150 cases, while a refund attorney might have as few as 20 cases. Before the reorganization, management of the Tax Division was dominated by former refund attorneys and there were far more refund attorneys than general litigation attorneys. The reorganization caused a major cultural change within the Tax Division. It dispelled the then-common misconception that the refund attorneys were stronger litigators.

Today there are so few refund suits that, had the Tax Division not been reorganized, there would be no need for more than one refund section. A large percentage of our cases now are what would have been considered general litigation cases in the old days, such as actions to collect unpaid taxes or bankruptcy cases in which the government is competing with other creditors, although the average refund suit consumes more resources than the average general litigation type suit. In the 1970's, it was common for a civil section to have 20 to 25 jury trials per year, whereas now the entire Tax Division may have as few as 15 civil jury trials in a year.

The day-to-day life of a Tax Division trial attorney also has changed. When I started, I spent more time on the road than is common for an attorney today. Refund suits normally took several days to try. Trial attorneys now spend less time on the road because courts permit more teleconference hearings and most court appearances, and even trials, can be concluded in a single day. I was attracted to the Tax Division by the opportunity to be on my feet in court, so I didn't mind the travel. The Tax Division still is the best place to get trial experience in my view, although there is more emphasis now on pre-trial motions than there used to be.

FBA: What caused the decline in tax refund litigation?

PM: I think one factor is that the IRS places greater emphasis on resolving disputes administratively. Another factor is increased litigation costs and overburdened judicial dockets. For many taxpayers, resolving cases with the IRS through the administrative process is a more efficient and intelligent way of conducting their affairs than going to court. In most instances, the same is true for the United States. For example, the Tax Division used to be asked to litigate trust fund recovery cases involving tremendous potential liability, even though there was no chance of actually recovering significant amounts. In the last ten to fifteen years, the IRS has focused not only on liability and legal merit, but also on collectability, leading to more administrative resolutions and more efficient tax administration.

Tax shelter litigation has, to some extent, filled the void left by the decrease in tax refund cases. Tax shelter cases are resource intensive. Many tax shelter cases are partnership proceedings and technically are not refund cases, but substantively they are very similar to traditional refund work. Also, the Tax Division now seeks tax return preparer injunctions and injunctions against promoters of abusive tax schemes. Sadly, in the last ten years we have seen, and continue to see, many more cases involving professionals who attempt to profit from helping others underreport their taxes.

FBA: When the history of the Tax Division is written, what will be the highlights of the last several decades?

PM: That is a difficult question to answer because it is easy to get caught up in current issues. I believe that the ongoing tax shelter litigation, which began in the late 1990's, will prove to be very important because it is essential that taxpayers believe that the system is fair. It would have been devastating to tax enforcement in general for us not to be able to stop or at least limit the abusive tax shelters.

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Our tremendous success in prominent early tax shelter cases persuaded many taxpayers not to continue litigating shelter cases. There still are some shelters being litigated, like foreign tax credit generators, but overall we've seen a decrease in the number of sophisticated shelters coming in, which is good news for tax administration. It is less clear to me whether tax shelter cases now are being settled at the administrative level or whether the taxpayers are simply accepting their fate.

Our injunction program targeting abusive tax return preparers and shelter promoters also has been important. Injunctions are necessary because it takes too long to criminally prosecute the offenders and the schemes are easily replicated, so they can do much damage in a short period of time if left unchecked.

FBA: What is the Tax Division's relationship with the IRS Office of Chief Counsel?

PM: In a sense, the IRS is our client, and we work closely with, and communicate freely with, the Office of Chief Counsel, certainly more so than 30 years ago. In a tax refund action, for example, if the Tax Division and Office of Chief Counsel disagree on a position, we hold a joint conference to discuss the issues. These meetings often are enlightening. The Tax Division benefits from the Chief Counsel Office's substantive tax expertise, and the Chief Counsel Office benefits from our broader litigation expertise. Often, even in a substantive tax case, there are considerations other than substantive tax issues, such as how a case will play out in bankruptcy proceedings, which convince the Chief Counsel Office to change its view of litigation hazards. Also, Chief Counsel attorneys are assigned to some of our tax shelter cases involving technical issues as a part of the trial team.

FBA: How does the Tax Division make decisions regarding settling or appealing cases?

PM: With respect to both compromises and appeals, the views of the trial attorneys and the chief counsel are important. In many cases, there is agreement between the Tax Division and the chief counsel on which course of action is in the best interests of the United States. On occasion, there is disagreement and we have procedures for resolving those situations.

Regarding settlements, the relevant section chief will make the decision whether or not to settle a case in cases involving less than \$500,000, assuming the Office of Chief Counsel does not object. Trial attorneys do not have that authority, although a recommendation by a trial attorney generally will be followed if it is reasonable. Settlement

decisions relating to cases involving amounts over \$500,000 are made by higher level officials within the Tax Division, or where more than \$2 million is involved, the Associate Attorney General, unless it is a case that must go to the Joint Committee on Taxation.

Regarding appeals, if the Tax Division receives an adverse decision, the relevant trial section and the appellate section will make recommendations to the Solicitor General's office. If the trial and appellate sections agree, the recommendation becomes the Tax Division's official position. If they don't agree, there will be a conference and the Tax Division's position will be decided upon by the deputy assistant attorney general for appellate. The Chief Counsel's Office will also make a recommendation to the solicitor general. Ultimately, the solicitor general's office decides whether to appeal the case. As a practical matter, if the solicitor general's office disagrees with the Tax Division's position, or that of the chief counsel, it will typically offer a conference, rather than simply dismissing the recommendation. Conferences regarding appeal are always extremely interesting.

FBA: Which skills are most important for litigators entering the Tax Division?

PM: Because so much of our work now is motions-based, we look for good writers. I try to avoid hiring lawyers who shy away from conflict, so I look for participation in competitive athletics, moot court, theater, politics, or student body—anything that evinces the courage to stick your neck out. I also look for attorneys who are collegial, as collaboration is what makes the Tax Division run.

We provide litigation training, so we don't expect attorneys to have those skills already. Each new hire is assigned a formal mentor, but informal mentoring by experienced attorneys is more important in my view. For example, I recall once waiting in a line that stretched down the hall to talk to a Tax Division attorney who had tremendous expertise in liens and levies. It was like waiting to talk to a professor after class. This collaborative environment is what many former Tax Division attorneys tell me they miss most.

The reward for a young Tax Division attorney for working hard is getting harder cases. There is a difference between talking about how to swim and throwing someone in the water to see if they can swim, and there is no learning experience quite like actually writing a brief and having to defend your argument on your feet, knowing that the United States is depending on you to do your best. ❖