

**Masters in Federal Tax Cases  
The Role of Special as Identified in Court Opinions**

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**INTRODUCTION**

The public requires the courts to address difficult issues that call for a disproportionate amount of and often unavailable judicial attention and expertise due to the large number of court cases and the lack of judges. (Scheidlin 2009, 479, 486) Post-trial assignments can continue for years after an opinion is issued. Special masters may assist the courts with assignments at any stage of a trial. In some cases with and the others without the consent of the parties, special masters may be appointed in litigation support roles before, during or after a trial. Could forensic accountants serve in this role? Forensic accountants have been increasing their presence in litigation support roles including tax litigation over the past decades. They identify, record, settle, extract, sort, report and verify past financial data or other accounting activities for the purpose of settling legal disputes or use such past financial data for projecting future financial data to settle legal disputes. (Crumbley et al. 2011, 1-5) Their services generally include the interpretation and communication of findings in the courtroom and other legal venues. (AICPA 2011, 2) This paper explores the evolving roles of special masters and suggests that accountants with a forensic background can serve the court in this capacity.

This is the authors' third article that studies the services for which experts are retained in tax cases as they are disclosed in court opinions. The overall objectives of the three studies are to determine the roles accountants can play in the courts and to make suggestions on how accountants could further aid the courts deal with their backlog problem in complex fact-driven tax cases. The first article presents a comprehensive analysis of what judges have written about forensic accounting experts in federal and state tax court decisions. (Muehlmann *et al.*, 2012) The second article shows the results of a survey of federal tax cases that make use of summary witnesses to determine how they are used during the trial and reasons for appeals of summary witnesses' testimony. (Muehlmann *et al.*, 2013)

This third study analyzes how special masters have been utilized in federal tax cases across all courts and presents the insights gained from court opinions. It goes on to explore whether forensic accountants as special masters could help backlogged courts with assignments in fact-driven complex civil tax cases. Utilizing the case survey archival research method, the paper presents the results of an analysis of the trends in the use of special masters, who they were and what jobs they held, what assignments they performed and what the appeals challenges were related to special masters. When available, the results section provides details of special master roles that accountants have played in past cases. This is the first paper to analyze the use of special masters in tax cases. The following provides a literature review, research questions, an overview of the methodology used in this study and an analysis of the findings based on the research questions.

**LITERATURE REVIEW**

*Overview of Special Masters*

When courts encounter judicial limitations, shortcomings of the traditional adjudicatory system, or shortcomings of parties or counsel, they may appoint special masters. (Brazil, 1986) Although an expert witness or summary witness is typically appointed by a party to a court case and may testify in both civil and criminal

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court proceedings, a special master can only be appointed by the court in civil cases. Section 53 of the Federal Rules of Civil Procedure (Fed. R of Civ. P. 53) governs the appointment of special masters, their authority, actions available to the parties on a master's order, report, or recommendations. Any party may suggest candidates for appointment as a special master. The court must give the parties notice and an opportunity to be heard prior to appointment. It establishes the master's compensation and allocates the payment to the parties. While pre-trial and trial fees may be split among the parties, post-trial fees are often paid by the liable party. (Keller 1998)

Fellows and Haydock (2005) described federal court special masters as a vital resource of growing need in the area of complex litigation and predicted that special master appointments would become more common and important in the years ahead. Tax litigation is one of the areas where courts use special masters. The tax law has been recognized as being complex for decades (Griswold 1944, 1192). It has reached a level of complexity that produces controversy as a result of encouraging tax shelters and aggressive positions that reduce compliance (Olson 2011, 7). Patent law is another area in which the presence of special masters has increased. Kesan and Ball (2009) performed a study of the use of special masters in patent litigation in response to a request from the Federal Judicial Center. They found that special master's recommendations are given considerable deference.

According to the Legal Information Institute (2013), a "special master" is theoretically distinguished from a "master". Whereas a master's function is essentially investigative and consists of compiling evidence or documents, a special master carries out some direct action on the part of the court. In practice, the "special master" designation has become the term of choice to describe all appointments of master roles. On the website of the Academy of Court-Appointed Masters (2013), accounting is listed as a subject of experienced special masters.

Fed. R of Civ. P. 53 recognizes that in appropriate circumstances masters may properly be appointed to perform a variety of pretrial, trial and post-trial functions to aid the court in trial or appeals proceedings. The rule was amended in 2003 to clarify the provisions that govern the appointment and function of masters for all purposes. R. 53(b)(2) requires precise designation of the master's duties and authority including any investigating or enforcement duties. Internal Revenue Code (IRC) Section 7443A allows a Chief Judge in the Tax Court to appoint a Special Trial Judge as a special master that follows US Tax Court Rule 183 under Title XVIII Special Trial Judges.

### ***History of Special Master's Roles***

Scheidlin and Redgrave (2004, 18-21) provide a history of the use of special masters as their role has evolved over time. Specialists were used as trial masters in matters where there was an "exceptional condition" and were the "exception rather than the rule." They could hear testimony in jury cases to report on findings of facts where there were complex issues. In this limited role they were included in the Federal Equity Rules in 1912 and incorporated into the Federal Rules of Civil Procedures as Rule 53 in 1938. In non-jury cases, reference to special masters could only be made for matters of account or difficult determination of damages when there were exceptional circumstances. See Rule 53 in the Appendix.

The use of special masters grew beyond the confines of Rule 53 to include oversight of complex discovery issues and enforcement of post-judgment orders. Prior to the 2003 amendment several titles were used to describe the type of work masters provided to the courts. Discovery Masters were used in district courts at a time of increased dockets and not enough judges. Masters may oversee the discovery process by resolving disputes, establishing procedures and calendars, monitoring document production and attending depositions and conferences. (Scheidlin and Redgrave, 2004, 19)

Another type of masters was used to oversee post trial issues such as crafting and to oversee remedial stage litigation such as the administration of class settlements, monitoring compliance with post-judgment decrees and analyzing validity of consent decrees. (Scheidlin and Redgrave, 2004, 21) In 2003 Rule 53 was revised to have a rule-based approach for the use of special masters in three areas: pretrial, trial and post-trial. See Table 1 for how Scheindlin and Redgrave described the type of masters based on their reading of Rule 53 and Committee Notes on Rules for the 2003 Amendment. They break down the types of masters into pre-trial, consent, trial and post-trial masters.

### ***Study of Roles Played by Special Masters***

Ferleger (2004), who has been a special master since 1997, undertook an extensive study of the duties performed by special masters over a 30-year period. He noted that, while Rule 53 does not outline the qualifications of a person who may serve as a special master, experts in specific legal or non-legal roles have served. Courts have appointed multiple masters in a single case with particularly complex issues. Ferleger breaks down the type of masters into: pre-trial, trial and consent, technical advisor, post-trial and augmented masters. Table 2 presents the tasks he found that each performed.

### ***Tax Court's Use of Special Trial Judges***

Pakenham (2004) compiled a history of how Special Trial Judges became an integral part of the Tax Court. Initially established as the U.S. Board of Tax Appeals in 1924, in order to address the increasing tax-related litigation in the number of cases and complexity, it was renamed as the Tax Court of the United States ("Tax Court") by Congress in 1942. The Tax Court is comprised of 19 presidentially appointed judges, who serve 15-year terms. She noted that beginning in 1943 the Tax Court started using judicial officers of limited authority to assist its judges in fact-finding. Although the formal decision had to be rendered by a judge of the Tax Court, in 1969 Congress expanded the authority of these commissioners in cases involving \$1,000 or less to write summary opinions. In 1986, filings in the Tax Court were at an all-time high due to tax shelter litigation. In the Tax Reform Act of 1986, Internal Revenue Code ("IRC") Section 7443A was enacted to aid the Tax Court judges by expanding the role of the judicial officers and created the term Special Trial Judge.

The Chief Judge of the Tax Court is authorized to appoint a Special Trial Judge. US Tax Court Rules 180 to 183 under Title XVIII govern Special Trial Judges. The court may authorize a Special Trial Judge to make a decision under Tax Court Rule 182 in small tax cases (as defined in Rule 170); in cases where neither the amount of the deficiency placed in dispute (within the meaning of Code section 7463), nor the amount of any claimed overpayment, exceeds \$50,000; in declaratory judgment actions; in lien and levy actions; and in whistleblower actions. Finnegan et al. (2012) prepared a comprehensive analysis of all cases that were litigated in the Small Case Division of the U.S. Tax Court from 2001 to 2009. The trial of small cases is the most frequently used portion of Rule 182 and the one for which Special Trial Judges are known best.

Tax Court Rule 183 outlines the powers and duties of a Special Trial Judge when serving in the role of a special master in complex litigation which include: trial and briefs, recommendations, objections and action on the recommendations. Young (2010) reported on the *Estate of Kanter* case that resulted in the recommendations of Special Trial Judges being released to litigators. He found that Tax Court Rule 183 was revised to allow parties to the case to review the Special Trial Judges' reports, because they were not allowed access prior to 2005.

Based on the literature review, Table 1 was developed to provide a description of types of master based on Rule 53. Table 2 lists the tasks performed by special masters. The following section discusses the research questions used to gain insights from court opinions about special masters in federal tax cases.

## **RESEARCH QUESTIONS**

As mentioned above, when courts encounter judicial limitations, shortcomings of the traditional adjudicatory system, or shortcomings of parties or counsel, a special master may be appointed. (Brazil, 1986) In spite of periodic attempts at tax simplification (Brownlee, 2004), the complexity of the tax law and resulting litigation continue to increase. To analyze how special masters have been utilized in federal tax cases across all courts the following research questions will be used as a basis of analysis.

RQ1: What are the trends in the use of the types of special masters over time by the following?

- Type of court.
- Type of tax issue in dispute and geographic location of the tax issues.
- Type of Special Master.
- Case outcome.

RQ2: What were jobs or occupations of the special masters?

RQ3: What assignments did the special masters perform?

RQ4: What were the appeals challenges used in trial courts related to special masters?

The next section outlines the process used to perform the research.

## **RESEARCH DESIGN**

The article used the survey of tax cases as an archival research methodology. To find cases where special masters were used, tax court case databases were searched. Then a detailed review of each tax case was done to identify whether a special master was appointed. This final list of court opinions was then analyzed to answer the research questions. The following discusses the databases used to find the federal tax cases that involved special masters.

### ***Databases***

Court opinions have three main functions. The primary function of a written opinion is to communicate the court's conclusions and the reasons for them to the parties and their lawyers. When issued, each opinion should fairly, clearly and accurately state the significant facts, the relevant rules of law and a demonstration of the reasonableness of its conclusions. The other two functions are to impose intellectual discipline on the judge when developing the opinion and to announce the law when an opinion is published. (Federal Judicial Center, 1991, 1 and 2013, 1)

The court opinions were retrieved from several databases. The main database was West's National Reporter System published within the WestlawNext online service. The search string "special master" was used for data retrieval. With the exception of the U.S. Tax Court, it was first applied to all cases that are pre-categorized as "Tax" cases by Westlaw. In order to increase the likelihood that no tax cases were missed, a second review using the combination of the strings "special master" and "Internal Revenue" was performed to search all federal court cases in the database. In the U.S. Tax Court the Special Trial Judges perform the role of special master. When they serve as a special master, an opinion indicates this by reference to Tax Court "Rule 183." Therefore, for the search of U.S. Tax Court opinions "Rule 183" was used as the search string.

The collection of cases in Westlaw Next represents all court decisions that were made available to the public officially. As all court opinions were published only in earlier years, there is no single complete source of opinions that have been issued by U.S. courts. Since 1964, the publication of a decision at most trial and appeals courts changed to follow either the rules of the court or the decisions of judges. The criterion for publication is whether an opinion is thought to be of precedential value as opposed to one that simply repeats previously established legal principles. (Gerken, 2004, 478-9) Therefore only a small portion of all decided cases is available in the research databases.

Even though courts consider them to be of lesser precedential value, editors of commercial case databases also choose “unpublished” opinions for inclusion. Although they are in fact published, these opinions are referred to as unpublished. Their citation format usually allows the user to distinguish them from officially published opinions. The inclusion of “published-unpublished” opinions in addition to “published-published” opinions in case databases results in variations of the case collections in the databases.

The collection of historical court opinions varies by database. The cases in the databases date back as far as the year 1860 (Pratt et al., 2008, 989-990). The U.S. Tax Court and its predecessor, the U.S. Board of Tax Appeals, started reporting opinions in 1924. In order to use as many opinions as were accessible for this analysis, the Westlaw Next results were supplemented with cases identified by using the search string “special master” in the following specialized tax case collections: CCH IntelliConnect; RIA ThomsonReuters Checkpoint; and Tax Analysts Research Libraries (also known as TaxAnalysts, it includes the cases for the Bloomberg BNA database). A special master may also have been used in unpublished cases and performed pre-trial services in cases that were settled, both of which are not yet included in any of the databases. An opinion may be written by a judge or drafted by a law clerk and then finalized by a judge. (Sobel, 2007, 86) It is at the judge’s discretion how much information about a special master and the master’s involvement in a case is deemed significant and thus included in the written opinion. As a result, the data collected for this study has limitations due to the incomplete case collections and the judiciary discretion regarding the contents of a written opinion. This includes leaving out the fact that a special master was used in a court case if it was deemed insignificant by the judge. The following section describes the data retrieval procedure.

### ***Selection and Presentation of Tax Cases***

In WestlawNext, the search string “special master” yielded 931 tax cases. In the full case collection in WestlawNext, no additional cases were identified in the broad search for “special master” and “Internal Revenue.” The broad searches were used as special masters frequently perform a supporting role that is not described in a particular place in a case opinion. Special masters were occasionally, but not consistently, mentioned in a case summary or head note.

The reasons for rejection of a case were that: an opinion referred to the work of a special master in a related case (e.g., a divorce or class action lawsuit); a special master was mentioned in a case reference; or although the search found the string of words, they did not identify a special master. The databases were accessed through June 5, 2013. As a special master may be appointed on any court level, related court opinions were consolidated and presented on the level of the court that involved the special master. A detailed review of the 931 opinions led to 41 qualifying cases. These were supplemented with 21 “published-unpublished” opinions from the specialized tax-only databases CCH IntelliConnect, RIA ThomsonReuters Checkpoint and Tax Analysts (TaxAnalysts) Research Libraries. Adding 17 cases from the “Rule 183” search of Tax Court cases resulted in the total of 79 qualifying cases that were used in the analysis. As the use of special masters is reserved for complex cases and their publication depends on precedential value, it is not surprising that there were so few cases found for the study. To support this limited use, Fellows and Haydock (2005, 1271) advised against using special masters in routine cases.

Even though the 79 cases span almost nine decades, all have special master assignments that could be performed in the future. There was no case in which more than one special master was appointed. While this study presents the first comprehensive analysis of the use of special masters in tax cases, due to the limited number of tax court opinions in which they were appointed, this paper cannot offer a statistically rigorous assessment of the findings. The following section discusses the findings for each of the research questions.

## **ANALYSIS OF THE RESULTS**

In this study about the utilization of special masters in tax cases, the 79 identified cases were analyzed to provide insights into the research questions about the roles played by special masters in federal tax cases. The results for the research questions are discussed below.

### ***Trends Over Time in the Use of Special Masters by Court, by Type of Tax Issue in Dispute, by Geographic Location, by Type of Special Master and Case Outcome (RQ1)***

#### **Over Time the Use of Special Masters by Type of Court**

Table 3 shows the utilization of special masters over time and the type of courts in which they appeared. The databases contain cases that were decided since 1860. The earliest case opinion that cites special masters was issued in 1924. From 1931-1940, there were nine opinions that mentioned the involvement of a special master. From the 1940s to the 1970s, there were three, seven, four and four opinions per decade. The number increased to 15 in the 1980s, dropped to nine in the 1990s and reached an all-time high of 21 cases in the 2000s. There were five opinions issued in 2011 and 2012. Over time the majority of cases were decided by US district courts with 50 decisions or 63.3% of all decisions. The Tax Court issued 17 opinions or 21.5%, followed by the Court of Federal Claims (6 cases), the Bankruptcy Court (4) and the U.S. Supreme Court (2). With ten opinions, the period with the highest concentration of decisions using special masters was from 2006 to 2007. During this time, the Tax Court issued seven decisions with special master involvement; the Court of Federal Claims two; and the district courts one.

#### **Types of Tax, Issues in Dispute and Geographic Location of the Tax Issues**

As listed in Table 4, the largest number of cases involved individual or corporate income taxes for a total of 51 cases (64.5%). The types of tax issues were disclosed in all but one case. Forty-four percent or 35 cases dealt with income tax in general, issues of individuals, pass-through entities, trusts and tax shelters. Another 16 cases (20%) were decisions on corporate income including excess profits tax disputes. Estate (4), payroll (7) and excise tax (3) issues were also addressed. The remaining 13 cases (15.5%) dealt with collection issues. District courts (50 cases or 63.3%) outnumbered the other courts in each type of tax issue followed by the Tax Court (17 cases or 21.5%).

Table 5 shows that 70 cases (88.6%) involving special masters were domestic and nine covered (11.4%) international issues. The two opinions that showed accountants appointed as special masters were domestic. Issued in 1935, the oldest international decision involved a transaction with Canada. The other disclosed international jurisdictions mentioned in the cases are Antigua, Aruba, Bahamas, British Virgin Islands, France, Germany, Hong Kong, India, Japan, Liechtenstein, Netherlands, Norway, Singapore, Switzerland, UK and Vietnam. Only one international opinion used the generic term "offshore and foreign." Special masters were used in the most recent decade in four (44.4%) of the nine international tax cases starting in 2003. As discussed in the introduction, this was the year that R. 53 was amended for clarification.

#### **Types of Special Masters**

Special masters' case assignments are a function of the type of their appointment. As the type of appointment is not expressly stated in an opinion, the description of the role or assignment in each case was used to identify the type of a special master. The role of the special master was disclosed in 77 (97%) of the 79 opinions. For this analysis, Ferleger's (2004) six categories summarized in Table 2 were used. Table 6 shows the number of cases by special master category and type of court. Trial special masters were appointed in 42 cases (53%), followed by post-trial special masters in 15 cases (19%), pre-trial special masters in 10 cases (13%), consent special masters in six cases (7%) and special masters as technical advisers in four cases (5%). No augmented special masters were identified in tax cases. Trial special masters were the most frequently used role at District courts (22 Table 6 of 50 cases Table 5), Tax Court (13 of 17 cases) and the Court of Federal Claims (five of six cases). Bankruptcy courts and the Supreme Court appointed one trial special master each. Post-trial masters were the second most used masters by district courts with 12 cases and were used in Bankruptcy courts in two of four cases.

The Tax Court utilized the services of a post-trial special master in one case. Pre-trial masters served in eight district court cases and in one case at each the Tax Court and the Supreme Court. The parties in the trial consented to the use of a special master in five of the District Court and one of the Tax Court cases. Special masters performed in the role of a technical adviser to the judge in three District Court cases and one Bankruptcy Court case.

It appears from this analysis that District courts were the pioneers in the disclosure and use of special masters in tax cases. Post-trial masters were the earliest role mentioned in tax cases. The first court opinion to mention the use of special masters was the Northern District of Illinois in the 1924 in *U.S. v. Chicago & E.I. Ry. Co.* The first disclosure of a pre-trial master was in the Southern District of New York in the case of *In re National Public Utility Investing Corporation* in 1935. The first trial master was mentioned in the Massachusetts District in the case of *In re Galveston-Houston Electric Co.* in 1936. The first consent master was identified in *U.S. v. Arkwright Mills* in 1943 in the Western District of South Carolina and the first technical adviser was discussed in *Liebl v. U.S.* in the Southern District of Ohio in 1972.

## **Case Outcome**

Table 7 presents the outcome of cases in which roles of special masters were disclosed. Of the 79 cases, 43 (54.4%) were decided for the government and 19 (24.1%) for the taxpayer. For both either party in part and motion declined, 8 (10.1%) cases were found. In both the district courts and the Tax Court, roughly twice as many of the cases were decided for the government as for the taxpayer. Although the case outcomes were equal between taxpayers and the government in the district court until 1950, the cases decided for the government have outweighed each other category since the 1970s. In the Tax Court, the government won twice as many cases as the taxpayer. The following section provides insights into the types of jobs or occupations held by special masters.

### ***Special Master's Job or Occupation (RQ2)***

Brazil (1986) pointed out that courts may appoint special masters when they encounter judicial limitations, shortcomings of the traditional adjudicatory system, or shortcomings of parties or counsel. Any disclosure about a special master in the court opinion is at the discretion of the judge in the case. The disclosure of the special masters' jobs or occupations was rare until 1980. Job type was only found in five of the 29 cases from this period in the collection. In the period from 1981 to 2012, the disclosure is present in 39 of 50 cases that were decided. None of the bankruptcy court opinions in the collection contained the jobs or occupations of the special masters.

Table 8 shows that of the 79 cases reviewed, 45 (57%) disclosed the special master's job or occupation. Magistrate or Special Trial Judges used as special masters were not identified in opinions until the 1980s. Since 1981, 30 cases (38%) disclosed them being appointed as special masters. Beginning in the 1930s, lawyers were identified as special masters in court records. They were mentioned in nine (11%) of the cases. Accountants were identified in two cases decided in 2001 to 2003. One was a retired partner of a large international accounting firm and the other was an Attorney-CPA with over 20 years in practice. A tax law professor was named in two opinions released in 2011 and 2012. In an opinion decided in 1937 a referee and in 1963 a special masters at the Department of Justice were disclosed.

The district court opinions revealed the use of magistrate judges in 12 cases; lawyers in eight cases; the accountants mentioned above in two cases, the same tax law professor in two cases; and a referee in one opinion. Special Trial Judges in their role as special masters were disclosed in 12 cases. Of those, the Chief Special Trial Judge served in more cases than any other Special Trial Judge. In one case, a special master at the Department of Justice was disclosed. In all cases at the Court of Federal Claims, its Office of the Special Master appointed members. One of the two Supreme Court cases identified the special master as a lawyer.

The two cases that disclosed the appointment of accountants as special masters were decided in 2001 and 2003. They indicate that forensic accounting is not only a growing field overall, but that the expertise of forensic accountants has been sought for an additional role that was previously reserved for other experts. The following section presents an overview of the assignments of special masters.

### ***Assignments Performed by the Special Masters (RQ3)***

Although special masters' assignments were disclosed in 77 of the 79 cases, the specification and details of the work performed was varied. As the case assignments were a function of the type of their appointments, Table 9 presents the special master assignments based on the types of special masters listed in Table 6. The determination for categorization for Table 9 was made based on the details presented in the cases. When the court identified the special master's job or occupation, the assignment is listed in the respective category in Table 8. The remaining assignments found in the cases are listed at the bottom of each special master type. The type of court in which the case was tried is also noted.

While a review of Table 9 provides a wealth of information about the roles played by special masters, the following discussion focuses on the assignments given to the two accountants. Their assignments were different from the others in their respective categories, which is not to say that they would not have been capable of performing other assignments. The work of the two accountants in the role of special masters was not challenged in an appeals proceeding. Their decisions were accepted as final. They are on the record for performing two kinds of assignments within the scope of forensic accounting services as defined by Crumbley *et al.* (2011, 1-5) and the AICPA (2011, 2).

In *U.S. v. Prater* (2003), the taxpayers were charged with selling an illegal tax evasion scheme. The judge's order included that the defendants mail a letter to all their clients stating that they were enjoined from continuing to accept payment for tax-related services. This letter was also to notify the defendants' clients of the termination of their automatic monthly debit payments. It required express, written consent from any client that wished to continue paying to fund the defendants' legal defense. The court appointed an unidentified accountant to prepare monthly reports of the taxpayer's bank accounts, which were to be submitted to the accountant in the role of a post-trial special master who was charged with pointing out any irregularities or transactions that violated the preliminary injunction or the final order of contempt. He then was to issue a monthly report to the court and the parties in the event any improper transactions were revealed by the monthly audits.

In the second case, *Theodore A. Pride & Associates, Inc. v. U.S.* (2001), the accountant was assigned as a consent special master. He was to help resolve the disputes concerning the correct amount of agreed assessment of interest and penalties, and payments made by third parties with respect to the plaintiff's tax



liabilities. The court directed that the special master meet with the accountants for both parties in the case to determine the correct amounts involved. He prepared a preliminary report, which he forwarded to the court. About three months later, the court held a hearing at which the special master met with all counsel. Once the special master submitted a final report, the court directed the parties to file comments and briefs to the special master's report within two weeks.

Although the *Prater* and *Pride* cases above were the only ones that identified accountants, special masters that performed forensic accounting tasks, whose occupations were not listed, have been disclosed since 1984. As shown in Table 9, the forensic tasks were performed by pre-trial masters that: received evidence on the issues of the amount of a deduction and refund; conducted fact finding on secret accounts in Switzerland; heard and observed witnesses; and issued reports on the findings in their cases. Post-trial masters were found in two cases. The first was a class action where a post-trial master allocated money to individual class members. In the second case, the post-trial master determined an equitable plan of allocation and upon final approval administered the settlement. The judges only referred to audits in the special master assignments in the two case opinions where they appointed accountants.

Any party to a case in which a special master is assigned may seek review by an appeals court. In some cases, the trial court decisions were appealed. The following section discusses the reasons for appeals challenges that are related to the special master.

#### ***Appeals Challenges Related to Special Master (RQ4)***

This research question provides insights into the reasons for appeals in two categories: errors in the assignment and procedural errors. Table 10 shows the alleged errors and the appeals outcomes. The appeals reviews that were overturned or modified in trial court decisions are of particular importance. They help to understand the standard that the court of appeals applies. In the category of alleged error in the assignment, two trial court decisions were overturned. In one case, it was found that a special master reached an incorrect conclusion, which resulted in a denial of a tax claim. In another case, the special master deducted costs, but the conditions for taking the tax deduction were not met.

Alleged procedural errors led to reversals of two Tax Court decisions. In the first case, the decision was overturned because a judge did not give due regard to the fact finding of the Special Trial Judge. In the second case, the tax court judge applied a clearly erroneous standard to the Special Trial Judge's factual finding that resulted in the reinstatement of the Special Trial Judge's original findings. A trial court decision was modified where the special master's report included conclusions of law that the court was without jurisdiction to adjudicate. The following section provides a summary and conclusion based on the findings of the study.

#### **SUMMARY AND CONCLUSION**

This is the authors' third article that studies the services for which experts are retained in tax cases as they are disclosed in court opinions. The authors have previously studied the uses of accountants as expert witnesses and summary witnesses (Muehlmann *et al.*, 2012 and 2013). The role of a forensic accounting expert witness is to assist the trier of fact to understand the evidence. It is the role of a summary witness to present voluminous and complex data efficiently and effectively at trial. A special master aids the court in complex civil proceedings as deemed by the judge before, during or after trial. The role of special masters is broader than the roles of expert and summary witnesses, but unlike the others is only allowed by law in civil cases. The roles of accountants in courts have grown in recent decades. Using court opinions, the main objectives of the three studies were to establish the evolving utilization of forensic accounting experts, summary witnesses and special masters in tax cases and to find additional ways for accountants to aid courts in complex fact-driven cases.

The first article presents a comprehensive analysis of what federal and state judges in tax cases have written about forensic accountants who were presented by a party to the cases to testify as expert witnesses. (Muehlmann *et al.*, 2012) As 80 percent of reported cases that disclose forensic accountants as expert witnesses were decided in the last decade from 2001 to 2010, the study summarized that the use of forensic accountants as expert witnesses in tax cases is an emerging field. The three types of assignments that forensic accountants performed were fraud investigations, regulatory/governmental compliance issues and commercial damage determination. The paper found that judges looked favorably on the forensic accounting experts with proper professional credentials and experience. When available in the cases, the paper also provided a distillation of a judge's evaluation of the effectiveness of the expert testimony that was separate from the outcome of the case. (Muehlmann *et al.*, 2012)

The second article covers summary witnesses whose role it was to assist with aspects of complexity in court cases. It discussed the results of the first survey of federal tax cases that make use of summary witnesses to determine how they are used during the trial and reasons for appeals of their testimony. (Muehlmann *et al.*, 2013) The summary witnesses presented a summary of admissible evidence that would be inconvenient to admit in detail as primary evidence or provided pedagogical-device summaries of evidence that was presented in a trial. This research indicated that since 1968 the use of summary witnesses has steadily increased in federal tax cases and that they are used mainly in the U.S. District Courts. A large percentage (54.1%) of the summary witnesses presented pedagogical-device summaries. The majority of the summary witnesses were IRS Revenue Agents and IRS Special Agents. Among the disclosed jobs or occupations of other summary witnesses were two accountants, an expert in income tax and accounting and a tax preparer. (Muehlmann *et al.*, 2013)

This third study shows that special masters have aided the courts in federal tax cases for 90 years as pre-trial, trial, post-trial and consent masters in a variety of different assignments. As with the majority of the cases that disclosed summary witness testimony, most of the tax cases disclosing the involvement of special masters were tried in the district courts. Similar to the prior two papers, the majority of the tax issues concerned individual income tax. The second and third most frequent issues involving special masters were related to the corporate income tax and tax collection.

Of the 79 cases reviewed, nine had cross-border issues. The majority of special masters served as trial masters, post-trial masters or pre-trial masters. In 43 of the cases the government prevailed and 19 were found in favor of the taxpayer. It was found that 30 magistrate judges and ten lawyers were selected as special masters, while 34 cases did not identify the occupation of the individual serving the court. Appeals courts overturned four decisions that were based on errors made by special masters and when a judge did not give due regard to a special master's fact finding or applied a clearly erroneous standard.

All three papers studied roles that aid the court. Expert witnesses are presented by a party to the trial and must pass the Daubert challenge in order to testify. Summary witnesses are also presented by a party to the trial, but there is no Daubert challenge due to the non-scientific nature of their role. Judges may appoint expert witnesses, but rarely do so as they have to fund the cost of experts out of the court's budget. In contrast, when special masters are appointed the costs are allocated to the parties. Much of the litigation support work of forensic accountants occurs in the pre-trial discovery stage. (Crumbley *et al.*, 2011 8-5) Two accountants were appointed by the courts as consent and post-trial special masters.

Forensic accountants have been increasing their presence in litigation support roles over several decades. They have been identified as special masters in court opinions since 2001, the same time period in which the disclosure of expert witness testimony by forensic accountants increased. Assignments of unidentified special masters within the scope of forensic accounting as defined by Crumbley *et al.* (2011, 1-5) and the AICPA (2011, 2) were first disclosed in court opinions in 1984.

Fellows and Haydock (2005) described federal court special masters as a vital resource of growing need in the area of complex litigation and predicted that special master appointments would become more common and important in the years ahead. The courts have appointed mostly magistrate judges and lawyers as pre-trial

special masters. The results of this study show that tax litigation is a suitable area for the use of special masters and that accountants with the right skills could perform in this role. Many of the assignments performed by special masters in tax cases (see Table 9) fall under Crumbley's (2011, 8-5) and the AICPA's (2011, 2) definitions of forensic accounting services. The authors suggest that experienced forensic accountants have the skills to act as special masters to help judges establish the facts in cases involving complex fact-driven issues such as transfer pricing and other tax base erosion and profit shifting.

Forensic accountants as special masters can help courts reduce their backlog without additional financial burden on the courts. There are multiple paths for accountants to raise awareness of their relevant expertise and availability. Forensic accountants are uniquely qualified to perform audit assignments to verify past financial data or other accounting activities for settling legal disputes. A qualified accountant could apply to become a member of the Academy of Court Appointed Masters ("ACAM"), which serves as a resource for the judiciary to select special masters. The ACAM directory provides space for each member to list specialties. It would be helpful for accountants in listing their specialties to use the same terminology as judges use in their opinions such as a specialist in auditing for financial data verification assignments.

Judges' first-hand experience with forensic accountants as expert or summary witnesses may be a crucial component to establish trust and respect. When a party to a court case presents an accountant as an expert witness, the judge gets to know each expert witness presented. Muehlmann et al. (2012, p.33) found that judges assessed the testimony of forensic accountants in tax cases to have been effective in only 48% of the cases. The reason for the rejection of a forensic accountant's testimony included incorrectly performed bank deposit analyses, among others. (Muehlmann et al, 2012, p. 19) Forensic accountants should aim for an effectiveness rate closer to 100%. Continued analysis of prior testimony and offering training programs that prepare forensic accountants for effective performance including verification assignments would support individual efforts.

Greenaway (2009, 321) states that like an unhappy family each complex tax case is complex in its own way. Future research could provide an explanation why the use of accountants as special masters has been limited. It could suggest how to determine whether the fact pattern of a case calls for the use of forensic accountants in roles as expert witnesses, summary witnesses or special masters from the perspectives of the taxpayers, the Internal Revenue Service and the courts and whether it calls for a forensic accountant or other professionals. Future studies could provide insights into the opinions that judges have of accountants' analytical skills, to what extent old stereotypes still persist and how they have changed over time.

Future research could outline the characteristics, relevant skills, objectivity, prior experience, education and training requirements needed for acceptance by the courts to be appointed as special masters. These studies would extend prior work about these topics performed by Ponemon (1995), Crumbley and Russell (2004), Ricchiute (2004), DiGabriele (2008 and 2011), Heitger and Heitger (2008), Kranacher et al. (2008), Davis et al. (2009), McMullen and Sanchez (2010), Bressler (2012), Fenton and Isaacs (2012), Misuraca and Weinstein (2012).

Future papers could also explore the effectiveness of the marketing models by forensic accountants and the role that certifications play. Further, they may analyze the mechanisms by which the courts and forensic accountants collaborate in other countries and develop a model for a mechanism in the United States. For example, candidates in Austria who pass a comprehensive exam are entered into a public directory at <http://www.jusline.at/sachverstaendiger.html>. Researchers could also analyze court opinions in other areas of the law that are likely to benefit from the expertise of accountants in the special master role, such as state tax, securities law and court tax opinions from other countries.

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**TABLE 1**  
**Description of Types of Master Based on Rule 53\***

Type of Master	Description of Master**
Trial Master	<ul style="list-style-type: none"><li>• The rule eliminates the direct power of a court to appoint a trial master as to issues to be decided by a jury.</li><li>• The use of a trial master in jury cases is nevertheless permitted provided the parties consent.<ul style="list-style-type: none"><li>○ This exception is limited to parties that waive jury trial with respect to the issues submitted to the master or if the master's findings are to be submitted to the jury as evidence.</li></ul></li><li>• The amended rule continues to permit the use of trial masters in non-jury cases.</li><li>• The standard for appointment of non-jury trial masters is carried forward in the amended rule, <i>i.e.</i>, an appointment is warranted only by "some exceptional condition."</li><li>• The exceptions to this "exceptional condition" requirement are also retained. In matters of accounting or difficult computation of damages, use of a master is appropriate regardless of whether exceptional conditions are present.</li></ul>
Consent Master	<ul style="list-style-type: none"><li>• The appointment of "consent masters" to fulfill any role is expressly approved with the consent of the parties. The change imposes no restrictive standard on a master's appointment.</li><li>• Party consent does not require that the court make the appointment as the court retains unfettered discretion to refuse appointment.</li></ul>
Pre-trial and Post-trial Master	<ul style="list-style-type: none"><li>• Pretrial and post-trial matters that cannot be addressed effectively and timely by an available district judge or magistrate judge may be referred to a special master.</li><li>• Duties specifically include reviewing discovery documents for privilege, settlement negotiations, and administration of an organization.</li><li>• Oversight of complex decrees is also appropriate, particularly when a party has proved to be resistant or intransigent.</li></ul>

\*\* Scheindlin, S. A. and J. M. Redgrave. 2004. Revisions in Federal Rule 53 Provide New Options for Using Special masters in Litigation. *New York State Bar Association Journal* 76(1): 22.

\* Scheindlin, S. A. and J. M. Redgrave. 2004.

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**TABLE 2**  
**Tasks Performed by Special Masters\***

<b>Type of Master</b>	<b>Tasks Performed</b>
Pre-trial Master	<ul style="list-style-type: none"><li>• Mediation and settlement</li><li>• Evaluation of claims</li><li>• Case management generally</li><li>• Discovery supervision</li><li>• Preliminary rulings on privilege</li><li>• Interpretation of a settlement agreement</li><li>• Coordination of parallel or related multiple cases</li><li>• Taking and interpretation of technical or complex evidence</li><li>• Compilation of data</li></ul>
Trial Master and Consent Master	<ul style="list-style-type: none"><li>• Assigned trial duties</li><li>• Act as experts, and to testify as such</li><li>• Parties may agree to have their dispute heard by a master, either for final decision or subject to review by the court</li><li>• Refer trial of matters to a master for findings and recommendations</li><li>• Taking and interpretation of technical or complex evidence</li><li>• Compilation of data</li></ul>
Technical Advisor	<ul style="list-style-type: none"><li>• Technical advisor to the court is a judicial tutor and provides guidance on complex or specialized subject matter</li></ul>
Post-trial Master	<ul style="list-style-type: none"><li>• Drafting opinions</li><li>• Administration and distribution of settlement or judgment funds</li><li>• Monitoring of compliance with structural injunctions, especially those involving employment or other organizational change, or requiring reform in government services agencies</li><li>• Neutral observer within defendant's entity</li><li>• Recommendations to defendant regarding compliance techniques</li><li>• Analysis of the continuing efficacy of a decree</li><li>• Investigation</li><li>• Issuance of binding recommendations</li><li>• Review of fee applications</li></ul>
The Augmented Master	<ul style="list-style-type: none"><li>• Vigorous enforcement for when a court is faced with repeated non-compliance or a very uncooperative defendant</li><li>• Appointed to consider recommendations for contempt</li></ul>

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\* Ferleger, D. 2004. Masters in Complex Litigation and Amended Rule 53. Draft as of May 5, 2004.



**TABLE 3**  
**Number of Cases Identifying Special Masters by Court and Decade**

<b>Decade</b>	<b>District Courts</b>	<b>Tax Court</b>	<b>Court of Federal Claims</b>	<b>Bankruptcy Courts</b>	<b>Supreme Court</b>	<b>Total</b>
Until 1930	2	-	-	-	-	2
1931-1940	7	1	-	-	1	9
1941-1950	3	-	-	-	-	3
1951-1960	7	-	-	-	-	7
1961-1970	3	1	-	-	-	4
1971-1980	4	-	-	-	-	4
1981-1990	8	5	-	1	1	15
1991-2000	4	1	3	1	-	9
2001-2010	9	8	3	1	-	21
2011-2012	3	1	-	1	-	5
<b>Total by Type (%)</b>	<b>50 (63.3%)</b>	<b>17 (21.5%)</b>	<b>6 (7.6%)</b>	<b>4 (5.1%)</b>	<b>2 (2.5%)</b>	<b>79 (100%)</b>

**TABLE 4**  
**Number of Federal Tax Cases by Type of Tax Issues and Courts**

<b>Types of Tax Issues</b>	<b>District Courts</b>	<b>Tax Court</b>	<b>Court of Federal Claims</b>	<b>Bankruptcy Courts</b>	<b>Supreme Court</b>	<b>Total (%)</b>	
Individual Income Tax in General, Pass-through Entities, Trusts, Tax Shelters	17	10	4	3	1	35	(44.3%)
Corporate Income Tax Including Excess Profits Tax	12	4	-	-	-	16	(20.2%)
Estate Tax	1	2	-	-	1	4	(5.1%)
Payroll Tax	4	1	1	1	-	7	(8.9%)
Excise Tax	3	-	-	-	-	3	(3.8%)
Collection	12	-	1	-	-	13	(16.5%)
Not Disclosed	1	-	-	-	-	1	(1.2%)
<b>Total by court (%)</b>	<b>50 (63.3%)</b>	<b>17 (21.5%)</b>	<b>6 (7.6%)</b>	<b>4 (5%)</b>	<b>2 (2.6%)</b>	<b>79</b>	<b>(100.0%)</b>

**TABLE 5**  
**Number of Federal Income Tax Cases by Geographic Location: Domestic or International**

Decade	District Courts	Tax Court	Court of Federal Claims	Bankruptcy Courts	Supreme Court	Total
Until 1930	-	-	-	-	-	-
1931-1940	1 <sup>(a)</sup>	-	-	-	-	1
1941-1950	-	-	-	-	-	-
1951-1960	-	-	-	-	-	-
1961-1970	-	-	-	-	-	-
1971-1980	-	-	-	-	-	-
1981-1990	-	1 <sup>(d)</sup>	-	-	-	1
1991-2000	-	1 <sup>(e)</sup>	-	-	-	1
2001-2010	2 <sup>(b)</sup>	1 <sup>(f)</sup>	1 <sup>(g)</sup>	-	-	4
2011-2012	2 <sup>(c)</sup>	-	-	-	-	2
International Cases	5	3	1	-	-	9
(%)	(10.0%)	(17.6%)	(16.7%)			(11.4%)
Domestic Cases by Court	45	14	5	4	2	70
(%)	(90%)	(82.3%)	(83.3%)			(88.6%)
Total Cases	50	17	6	4	2	79

(a) Canada

(b) Bahamas, Germany, Liechtenstein and “offshore and foreign”

(c) France, Germany, India, Japan, Netherlands, Norway, Singapore and UK

(d) Switzerland

(e) Antigua, Aruba, British Virgin Islands, Netherlands and Switzerland

(f) Hong Kong

(g) Vietnam

**TABLE 6**  
**Number of Cases By Special Master Type by [Court District Courts/Tax Court/Court of Federal Claims/Bankruptcy Courts/Supreme Court]**

<b>Decade</b>	<b>Pre-trial</b>	<b>Trial</b>	<b>Post-trial</b>	<b>Con-sent</b>	<b>Techni-cal Adviser</b>	<b>Un-known</b>	<b>Total, by Decade</b>
Until 1930	-	-	2	-	-	-	2
	[-/-/-/-]	[-/-/-/-]	[2/-/-/-]	[-/-/-/-]	[-/-/-/-]	[-/-/-/-]	[2/-/-/-]
1931-1940	1	7	-	-	-	1	9
	[1/-/-/-]	[6/-/-/1]	[-/-/-/-]	[-/-/-/-]	[-/-/-/-]	[-/1/-/-]	[7/1/-/-/1]
1941-1950	-	1	1	1	-	-	3
	[-/-/-/-]	[1/-/-/-]	[1/-/-/-]	[1/-/-/-]	[-/-/-/-]	[-/-/-/-]	[3/-/-/-]
1951-1960	-	5	2	-	-	-	7
	[-/-/-/-]	[5/-/-/-]	[2/-/-/-]	[-/-/-/-]	[-/-/-/-]	[-/-/-/-]	[7/-/-/-]
1961-1970	-	2	1	-	-	-	3
	[-/-/-/-]	[2/-/-/-]	[1/1/-/-]	[-/-/-/-]	[-/-/-/-]	[-/-/-/-]	[3/1/-/-]
1971-1980	2	1	-	-	1	-	4
	[2/-/-/-]	[1/-/-/-]	[-/-/-/-]	[-/-/-/-]	[1/-/-/-]	[-/-/-/-]	[4/-/-/-]
1981-1990	6	6	-	2	1	-	15
	[4/1/-/-/1]	[2/3/-/1/-]	[-/-/-/-]	[1/1/-/-]	[1/-/-/-]	[-/-/-/-]	[8/5/-/1/1]
1991-2000	-	7	1	2	-	-	10
	[-/-/-/-]	[3/1/3/-/-]	[-/-/1/-]	[1/-/-/-]	[-/-/-/-]	[-/-/-/-]	[4/2/3/1/-]
2001-2010	1	12	6	-	1	1	21
	[1/-/-/-]	[1/9/2/-/-]	[6/-/-/-]	[1/-/-/-]	[-/-/1/-]	[-/1/1/-]	[9/8/3/1/-]
2011-2012	-	2	1	1	1	-	5
	[-/-/-/-]	[1/-/-/-]	[-/-/1/-]	[1/-/-/-]	[1/-/-/-]	[-/-/-/-]	[3/1/-/1/-]
<b>Total</b>	<b>10</b>	<b>42</b>	<b>15</b>	<b>6</b>	<b>4</b>	<b>2</b>	<b>79</b>
<b>(%)</b>	<b>(13%)</b>	<b>(53%)</b>	<b>(19%)</b>	<b>(7%)</b>	<b>(5%)</b>	<b>(3%)</b>	<b>(100%)</b>
<b>By Court Type</b>	<b>[8/1/-/-/1]</b>	<b>[22/13/5/1/1]</b>	<b>[12/1/-/2/-]</b>	<b>[5/1/-/-/1]</b>	<b>[3/-/-/1/-]</b>	<b>[-/1/1/-]</b>	<b>[50/17/6/4/2]</b>

**TABLE 7**  
**Federal Tax Cases Outcomes by Decade For [Taxpayer/ Either Party in Part/  
Government/Motion Declined/Inter-jurisdictional Case]**

Decade	District Courts	Tax Court	Court of Federal Claims	Bank- ruptcy Courts	Supreme Court
Until 1950	12 [6/-/6/-/-]	1 [1/-/-/-/-]	-	-	1 [-/-/-/1]
1951-1960	7 [1/-/-/6/-]	-	-	-	-
1961-1970	3 [2/-/1/-/-]	1 [1/-/-/-/-]	-	-	-
1971-1980	4 [1/1/2/-/-]	-	-	-	-
1981-1990	8 [1/1/6/-/-]	5 [2/-/3/-/-]	-	1 [1/-/-/-/-]	1 [-/-/1/-/-]
1991-2000	4 [-/-/4/-/-]	1 [-/-/1/-/-]	3 [-/1/2/-/-]	1 [-/-/1/-/-]	-
2001-2010	9 [2/2/4/1/-]	8 [-/2/6/-/-]	3 [-/-/3/-/-]	1 [-/-/1/-/-]	-
2011-2012	3 [-/1/1/1/-]	1 [1/-/-/-/-]	-	1 [-/-/1/-/-]	-
<b>Total, by Court</b>	<b>50</b> [13/5/24/8/-]	<b>17</b> [5/2/10/-/-]	<b>6</b> [-/1/5/-/-]	<b>4</b> [1/-/3/-/-]	<b>2</b> [-/-/1/-/1]
<b>Total Number and Percentage of Cases Won by Party</b>		<b>79</b> [19/8/43/8/1]		<b>100%</b> [24.1%/10.1%/54.4%/10.1%/1.3%]	

**TABLE 8**  
**Number of Cases Identifying Special Master by Occupation and by Court [District Courts/Tax Court/Court of Federal Claims/Bankruptcy Courts/ Supreme Court]**

<b>Decade</b>	<b>Lawyer</b>	<b>Magist- rate Judge<sup>(1)</sup></b>	<b>Accoun- -tant</b>	<b>Other<sup>(2)</sup></b>	<b>Not Identi- fied</b>	<b>Total, by Decade</b>
Until 1930	-	-	-	-	2	2
	[-/-/-/-]	[-/-/-/-]	[-/-/-/-]	[-/-/-/-]	[2/-/-/-]	[2/-/-/-]
1931-1940	1	-	-	1	7	9
	[1/-/-/-]	[-/-/-/-]	[-/-/-/-]	[1/-/-/-]	[5/1/-/-1]	[7/1/-/-1]
1941-1950	-	-	-	-	3	3
	[-/-/-/-]	[-/-/-/-]	[-/-/-/-]	[-/-/-/-]	[3/-/-/-]	[3/-/-/-]
1951-1960	3	-	-	-	4	7
	[3/-/-/-]	[-/-/-/-]	[-/-/-/-]	[-/-/-/-]	[4/-/-/-]	[7/-/-/-]
1961-1970	-	-	-	1	3	4
	[-/-/-/-]	[-/-/-/-]	[-/-/-/-]	[-/1/-/-]	[3/-/-/-]	[3/1/-/-]
1971-1980	-	-	-	-	4	4
	[-/-/-/-]	[-/-/-/-]	[-/-/-/-]	[-/-/-/-]	[4/-/-/-]	[4/-/-/-]
1981-1990	1	10	-	-	4	15
	[-/-/-/1]	[6/4/-/-]	[-/-/-/-]	[-/-/-/-]	[2/1/-/1-]	[8/5/-/1/1]
1991-2000	1	7	-	-	1	9
	[1/-/-/-]	[3/1/3/-/-]	[-/-/-/-]	[-/-/-/-]	[-/-/-/1-]	[4/1/3/1-]
2001-2010	2	12	2	-	5	21
	[2/-/-/-]	[3/6/3/-/-]	[2/-/-/-]	[-/-/-/-]	[2/2/-/1-]	[9/8/3/1-]
2011-2012	1	1	-	2	1	5
	[1/-/-/-]	[-/1/-/-]	[-/-/-/-]	[2/-/-/-]	[-/-/-/1-]	[3/1/-/1-]
<b>Total</b>	<b>9</b>	<b>30</b>	<b>2</b>	<b>4</b>	<b>34</b>	<b>79</b>
<b>(%)</b>	<b>(11%)</b>	<b>(38%)</b>	<b>(3%)</b>	<b>(5%)</b>	<b>(43%)</b>	<b>(100%)</b>
<b>by Type</b>	<b>[8/-/-/1]</b>	<b>[12/12/6/-/-]</b>	<b>[2/-/-/-]</b>	<b>[3/1/-/-]</b>	<b>[25/4/-/4/1]</b>	<b>[50/17/6/4/2]</b>

<sup>(1)</sup> At the U.S. Tax Court, the title *Special Trial Judge* is used. *Office of the Special Masters* is used at the Court of Federal Claims.

<sup>(2)</sup> 1931-1940: Referee, 1961-1970: Special Master at Department of Justice, 2011-2012: Tax law professor

**TABLE 9**  
**Special Master Case Assignments by Type of Special Master, Type of Job or Occupation, and Court (District Courts (D)/Tax Court (T)/Court of Federal Claims (C)/Bankruptcy Courts (B)/Supreme Court (S))**

<u>Assignment</u>	<u>Court</u>
<i>Pre-Trial</i>	
<u>Magistrate Judge</u>	
To conduct an examination of the withheld documents, evaluate the asserted privileges and submit a report and recommendation to the court.	D
To determine the validity and priority of claims claimed on the subject property and file a report and recommendation.	D
To review the internal audit reports and work papers of the taxpayer.	D
To hold an evidentiary hearing and make findings of fact and recommendations.	D
To conduct hearings and take evidence.	S
<u>Not Identified</u>	
To preside over a hearing and receive evidence on the issues of the amount of the deduction and refund and then issue a report.	D
To issue a report on the findings of the case.	D
To determine whether documents located in Canada to be produced were within the control of the taxpayer.	D
To conduct fact finding on secret accounts in Switzerland and to hear and observe the witnesses.	T
<i>Trial</i>	
<u>Lawyer</u>	
To hear argument and issued a report on the federal tax claim.	D
To issue findings of fact and conclusions of law.	D
To hear the case and to bring forth conclusions of fact and law.	D
To hold a number of hearings and to prepare a draft report, sign it and submit it to all parties in interest for suggestions; later to prepare a supplemental report with findings of fact as suggested to by the taxpayer's attorney.	D
To take evidence, to make findings of fact and state conclusions of law and to submit them to the court together with recommendations for a decree.	S
<u>Magistrate Judge</u>	
To conduct a trial to the court.	D
To conduct proceedings necessary to make a report in recommendation on the case.	D
To take testimony, hear evidence and make appropriate inquiries concerning the disposition of certain property which taxpayer claimed the U.S. seized under a tax levy but never returned to the taxpayer.	D
To conduct hearings and enter a report, findings of fact and conclusions of law together with a memorandum.	D
To hear oral argument on petitions and on respondent's motion in each action.	D
To make findings of fact and conclusions of law.	D
To evaluate whether petitioners effected an election converting partnership items to non-	T

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partnership items and whether the Court has jurisdiction over the items listed in the April 19, 2005, notice of deficiency.	
To evaluate the credibility of witnesses and to recommend findings of fact and conclusions of law.	T
To determine the credibility of taxpayer testimony, to recommend findings of fact and conclusions of law.	T
To evaluate credibility of witnesses and to recommend findings of fact and conclusions of law.	T
To observe petitioner testimony and recommend findings of fact and conclusions of law.	T
To prepare an opinion in response to taxpayer's application to perpetrate testimony prior to any petitions or redetermination of deficiencies or any determination of deficiencies.	T
To provide an opinion on petitioner's claim to abate interest for the taxable years in question.	T
To develop an opinion whether a taxpayer's transactions had economic substance and whether the taxpayer was entitled to interest or depreciation deductions as taken.	T
To conduct a trial of cases identified as having tax shelter issues and to issue an opinion.	T
To develop and issue an opinion in response to taxpayer's motion for lack of jurisdiction.	T
To evaluate to the taxpayer's intervention to challenge the value of stock in her deceased husband's estate and to issue a decision.	T
To recommend findings and conclusions of law. (2)	T
<u>Other: Law Professor</u>	
To give an opinion and order denying a summary judgment motion in an impending tax shelter transaction-related refund case.	D
<u>Other: Referee</u>	
To conduct a hearing and issue a report.	D
<u>Not Identified</u>	
To file a report with his conclusion whether taxes are due for the years in question.	D
To issue a report, which recommends whether the claims be allowed.	D
To issue an order based on the findings.	D
To issue a report with findings of fact and conclusions regarding the deduction of the cost of drilling an unproductive oil well; found the costs to be deductible.	D
To ascertain the state of the accounts between the taxpayer brothers.	D
To hear all questions of law and fact, to take testimony and to determine all equities and taxes, penalties and interest due by and between the parties.	D
To hear the case, determine the outcome of the taxpayer's petition and to file a report.	D
To hear and determine all issues in the case and to report same to the court with his findings of fact and conclusions of law and to certify to the court all documentary evidence adduced before the master.	D
To hear and dispose of the motions to dismiss and in the event that the motions were overruled to require that answers to the complaints be filed as required by law and that testimony and other evidence to be received with the special master to report his findings of fact and conclusions of law to this court.	D
To hear argument, determine the balance on taxpayer's mortgage and interest and enter a memorandum with findings.	D
To provide an opinion and order about a refund of partnership taxes that were paid via an IRS levy of funds contained in the taxpayer's IRA account.	C
To issue an opinion and order about a refund reflecting a net operating loss carryback.	C
To issue an opinion and order about payroll taxes and a request for abatement of the penalties assessed.	C
To issue an order on whether the complaint be dismissed due to lack of jurisdiction.	C
To issue an opinion whether the plaintiff has failed to show that he has a right to the deduction in	C

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the refund claim.  
 To provide a recommendation on which the judge would issue an order. B

***Consent***

Accountant

To help resolve the disputes concerning the correct amount of assessment of interest and penalties and payments made by third parties with respect to the plaintiff's tax liabilities. D

Lawyer

To oversee discovery during a status conference. D

To determine Plaintiff's outstanding tax liability. D

Magistrate or Special Trial Judge

To determine the employment status of individuals. D

To conduct a trial or dispose of the case otherwise. T

Not Identified

To take the testimony and make separate findings of fact and conclusions of law and report the same to the court. D

***Post-Trial***

Accountant

To ensure further compliance with the preliminary injunction by monthly auditing the defendant's bank accounts for any irregularities or transactions that appear to violate the preliminary injunction and to issue a monthly report to the Court and the parties in the event any improper transactions are revealed by the monthly audits. D

Lawyer

To publish a notice of the sale of property, to make a sale and to report his accounts and doings. D

To determine the refund amount for capital gains tax. D

Magistrate Judge

To find and recommend the amount of the compensatory sanction. D

To issue a report on the defendant's bill of cost. D

Other: Special Master at Department of Justice

To supervise the initiation of a sales program. T

Not Identified

To sell the taxpayer's interest. D

To facilitate the sale and pay out the proceedings of the sale on each general lien bond presented to him for payment. D

To conduct a sale. D

To determine whether the U.S. had priority claims to property to cover income taxes and customs duties owed. D

To sell railroad property and assets. D

To allocate moneys to individual class members in a class action suit. D

To determine an equitable plan of allocation; then administering the settlement upon final approval. D

To sell property. B

To facilitate the sale of property. B

***Technical Adviser***

Magistrate Judge

To issue a report about a disallowed investment credit. D

Other: Law Professor

To assist in clarifying and simplifying the issues before the court. D

Not Identified

To meet with counsel for the IRS and taxpayer and render a report on the applicability of the mitigation status. D

To testify about the relationship of assessed and real value of property. B

*Assignment Not Disclosed*

One case T

One case C

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**TABLE 10**  
**Reasons for Appeals Challenges Related to the Special Master**

**Reasons**

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**Alleged error in assignment**

***Trial Court Decision Overturned***

A special master concluded incorrectly that one of the defendants, the estate, was not a Qualified Settlement Fund (QSF) and recommended denial of the tax claim.

The conditions for deduction of the costs were not met.

***Trial Court Decisions Confirmed***

The special master sustained the government's claim to priority and fixed the amount of the income tax and the duties.

Substantially incorrect and incomplete recommendations.

Changes: Relocated a footnote, renumbered remaining footnotes, changed several headings, inserted an explanatory parenthetical sentence, and modified certain introductory provisions.

The Special Trial Judge waited for six years before filing his recommendations with the tax court.

The Special Trial Judge was biased because he presided over two prior cases involving the same taxpayer.

The taxpayers challenged the tax deficiencies from disallowed losses incurred as a result of investments in a commodity straddle program, which were determined by the Special Trial Judge even though they had consented to have the case heard by a Special Trial Judge.

***Appeal Dismissed without Prejudice***

(1) Tax Court order denying intervention would be a “decision” for purposes of appellate jurisdiction, but (2) Special Trial Judge appointed by the chief judge of Tax Court was not authorized to issue an order that would constitute a “decision” of the Tax Court with respect to denial of intervention.

**Alleged procedural errors**

***Trial Court Decisions Overturned***

The tax court judge did not give due regard to the fact finding of the Special Trial Judge.

The tax court judge applied a clearly erroneous standard to the Special Trial Judge’s factual finding. The Special Trial Judge’s original findings were reinstated.

***Trial Court Decision Modified***

The special master’s report included conclusions of law that the court was without jurisdiction to adjudicate. The court was without power to determine the amount of either the excise taxes or income tax under the circumstances of the case.

***Trial Court Decisions Confirmed***

The judge did not have statutory authority to refer civil case to federal magistrate for trial on merits provided parties consented to such procedure.

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**APPENDIX**

**Federal Rules of Civil Procedure 53 – Masters  
(Effective December 1, 2003)**

**(a) Appointment.**

- (1) *Scope.* Unless a statute provides otherwise, a court may appoint a master only to:
  - (A) perform duties consented to by the parties;
  - (B) hold trial proceedings and make or recommend findings of fact on issues to be decided by the court without a jury if appointment is warranted by
    - (i) some exceptional condition, or
    - (ii) the need to perform an accounting or resolve a difficult computation of damages; or
  - (C) address pre-trial and post-trial matters that cannot be addressed effectively and timely by an available district judge or magistrate judge of the district.
- (2) *Disqualification.* A master must not have a relationship to the parties, counsel, action, or court that would require disqualification of a judge under 28 U.S.C. § 455 unless the parties consent with the court's approval to appointment of a particular person after disclosure of any potential grounds for disqualification.
- (3) *Possible Expense or Delay.* In appointing a master, the court must consider the fairness of imposing the likely expenses on the parties and must protect against unreasonable expense or delay.

**(b) Order Appointing Master.**

- (1) *Notice.* The court must give the parties notice and an opportunity to be heard before appointing a master. A party may suggest candidates for appointment.
- (2) *Contents.* The order appointing a master must direct the master to proceed with all reasonable diligence and must state:
  - (A) the master's duties, including any investigation or enforcement duties, and any limits on the master's authority under Rule 53(c);
  - (B) the circumstances – if any – in which the master may communicate *ex parte* with the court or a party;
  - (C) the nature of the materials to be preserved and filed as the record of the master's activities;
  - (D) the time limits, method of filing the record, other procedures, and standards for reviewing the master's orders, findings, and recommendations; and
  - (E) the basis, terms, and procedure for fixing the master's compensation under Rule 53(h).
- (3) *Issuing.* The court may enter the order appointing a master only after:
  - (A) the master has filed an affidavit disclosing whether there is any ground for disqualification under 28 U.S.C. § 455 and
  - (B) if a ground for disqualification is disclosed, the parties, with the court's approval, waive the disqualification.
- (4) *Amending.* The order may be amended at any time after notice to the parties and an opportunity to be heard.

**APPENDIX Continued**

**Federal Rule of Civil Procedure 53 – Masters  
(Effective December 1, 2003)**

**(c) Master's Authority.**

(1) *In General.* Unless the appointing order directs otherwise, a master has may

(A) regulate all proceedings;

(B) take all appropriate measures to perform the assigned duties fairly and efficiently; and

(C) if conducting an evidentiary hearing, exercise the appointing court's power to compel, take, and record evidence.

(2) *Sanctions.* The master may by order impose upon a party any non-contempt sanction provided by Rule 37 or 45, and may recommend a contempt sanction against a party and sanctions against a nonparty.

**(d) Master's Orders.** A master who issues an order must file the order and promptly serve a copy on each party.

The clerk must enter the order on the docket.

**(e) Master's Reports.** A master must report to the court as required by the appointing order. The master must file the report and promptly serve a copy of the report on each party unless the court orders otherwise.

**(f) Action on Master's Order, Report, or Recommendations.**

(1) *Opportunities for a Hearing; Action in General.* In acting on a master's order, report, or recommendations, the court must give the parties notice and an opportunity to be heard; may receive evidence; and may adopt or affirm, modify, wholly or partly reject or reverse, or resubmit to the master with instructions.

(2) *Time to Object or Move to Adopt or Modify.* A party may file objections to—or a motion to adopt or modify—the master's order, report, or recommendations no later than 21 days after a copy is served, unless the court sets a different time.

(3) *Reviewing Factual Findings.* The court must decide de novo all objections to findings of fact made or recommended by a master, unless the parties, with the court's approval, stipulate that:

(A) the findings will be reviewed for clear error; or

(B) the findings of a master appointed under Rule 53(a)(1)(A) or (C) will be final.

(4) *Reviewing Legal Conclusions.* The court must decide de novo all objections to conclusions of law made or recommended by a master.

(5) *Reviewing Procedural Matters.* Unless the appointing order establishes a different standard of review, the court may set aside a master's ruling on a procedural matter only for an abuse of discretion.

**APPENDIX Continued**

**Federal Rule of Civil Procedure 53 – Masters**

(Effective December 1, 2003)

**(g) Compensation.**

(1) *Fixing Compensation.* Before or after judgment, the court must fix the master's compensation on the basis and terms stated in the appointing order, but the court may set a new basis and terms after giving notice and an opportunity to be heard.

(2) *Payment.* The compensation must be paid either:

(A) by a party or parties; or

(B) from a fund or subject matter of the action within the court's control.

(3) *Allocating Payment.* The court must allocate payment among the parties after considering the nature and amount of the controversy, the parties' means, and the extent to which any party is more responsible than other parties for the reference to a master. An interim allocation may be amended to reflect a decision on the merits.

**(h) Appointing a Magistrate Judge.** A magistrate judge is subject to this rule only when the order referring a matter to the magistrate judge states that the reference is made under this rule.

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