

A wooden gavel is positioned diagonally across the frame, resting on a folded American flag. The flag's stars and stripes are visible, with a dark blue field containing white stars and red and white stripes. The gavel is made of dark wood and has a smooth, polished finish. The background is a close-up of the flag's fabric, showing the texture and stitching.

What is the U.S. Tax Court? How is it different from other courts? How do you litigate a case before the Tax Court? This article will address these questions and others and will provide an interesting glimpse into a unique federal trial court.

BY NICHOLAS R. METCALF AND MARY W. PROSSER

Litigating a Case Before the U.S. Tax Court

The U.S. Tax Court handles the majority of federal tax litigation, both by number of cases and amount in dispute. As of Sept. 30, 2013, the Tax Court had almost 29,000 cases pending with an amount in dispute of approximately \$22 billion.¹ In comparison, the two other tax litigation forums (federal district courts and the Court of Federal Claims) had almost 1,000 tax cases pending with an amount in dispute of approximately \$9 billion.²

History of the Tax Court

From the beginning of the U.S. tax system, a taxpayer's only option for challenging an Internal Revenue Service (IRS) determination was a refund suit (i.e., the taxpayer was required to pay the full amount asserted by the IRS and sue for a refund). The refund suit procedure ensured that the government received the disputed amount, but it also stifled the ability for taxpayers to challenge unfair assessments. In 1924, Congress began the process of addressing the lack of a prepayment forum when it created the predecessor to the

Tax Court: the Board of Tax Appeals (BTA). The BTA was created to give taxpayers the opportunity to challenge IRS assessments before paying the disputed tax. As the name implies, the BTA was not a court; it was an administrative agency of the executive branch, and its determinations were not appealable. In 1926, Congress created judicial review for BTA determinations.

Over a number of years it became apparent that the BTA was actually a court, not an administrative agency. In 1942, Congress changed the BTA's name to the Tax Court of the United States. This was the first step toward becoming a court; however, Congress did not make the requisite changes required by the Constitution. In 1969, Congress finally designated the Tax Court as an Article I court pursuant to the Constitution.³ Article I, or legislative courts (e.g., the Tax Court, the Court of Appeals for the Armed Forces and the Court of Federal Claims), are different from Article III courts (e.g., the Supreme Court, federal courts of appeals, and U.S. district courts). A significant difference between Article I and Article III courts is judicial tenure. The President appoints Article III judges for life, and their salaries cannot be reduced by Congress. On the other hand, the President appoints Article I judges for 15-year terms, their salaries can be reduced by Congress, and they can be removed by the President for inefficiency, neglect of duty, or malfeasance.

Tax Court Judges

Tax Court trials are conducted without a jury. Thus, when taxpayers litigate cases in the Tax Court, they can expect the judges to be experts in federal tax law with long, distinguished resumes. Tax Court judges specialize in federal taxation, which can either be a benefit or a detriment to the taxpayer's case. If the taxpayer has a complex, highly technical case, he or she may want a tax expert to evaluate the case. On the other hand, a tax expert might be less sympathetic to certain arguments or might actually understand the inner workings of complex tax transactions in a manner detrimental to a taxpayer's case.

The President appoints 19 judges to serve 15-year terms, and they may be reappointed for subsequent terms. When a judge's term expires, or the judge reaches age 70, the judge assumes

on which the notice was mailed, a petition with the Tax Court. If the taxpayer does not file a petition, the IRS can begin the collection process. The taxpayer's only option then is to pay the liability and sue in district court or the Court of Federal Claims for a refund. One important consideration when choosing to litigate at the Tax Court is that the taxpayer's entire taxable year is at issue. The court can determine that the taxpayer owes more than the amount reported on the notice of deficiency. In contrast, as long as the statute of limitations on assessment has expired, a taxpayer suing for a refund will not be subject to an increased tax liability.

Starting a Case

A petition must indicate: (1) the date the notice of deficiency was issued; (2) the years (or periods) at issue; (3) whether the

The Tax Court is a court of national jurisdiction. Unlike the district court structure, in the Tax Court, a taxpayer in Seattle will be subject, with exceptions, to the same precedent as a taxpayer in Boston.

senior status.⁴ Tax Court judges come from academia, private practice, the Department of Justice, the Joint Committee on Taxation, the Senate Finance Committee, and the IRS. Unlike most federal judges, Tax Court judges are confirmed by the Senate Finance Committee, rather than the Senate Judiciary Committee. The 19 presidentially appointed judges elect one judge to serve as chief judge, and he or she typically serves for two consecutive two-year terms. In addition to presidentially appointed judges, the chief judge has the authority to appoint special trial judges. Special trial judges typically adjudicate small tax cases. Finally, senior judges can be recalled to serve at the request of the chief judge. They perform the same tasks as presidentially appointed judges, but they are not permitted to vote in Court Conference (unless a senior judge authored the opinion subject to the Court Conference vote).

The Tax Court is a court of national jurisdiction. Unlike the district court structure, in the Tax Court, a taxpayer in Seattle will be subject, with exceptions, to the same precedent as a taxpayer in Boston. The chief judge and his staff of attorneys review all proposed reports (the term used for unreleased opinions) prior to official release. This review process ensures the consistent treatment of issues by each of the judges. In addition, the chief judge performs a quality control function and proposes comments that can either be accepted or rejected by the authoring judge. In reviewing reports, the chief judge can also designate that a report be considered by the Court Conference (described later in this article).

Litigating a Case Before the Tax Court

A Tax Court case typically⁵ starts with the IRS issuing a notice of deficiency (commonly referred to as a 90-day letter). Notices of deficiency inform taxpayers that the IRS disagrees with their return, proposes adjustments, and determines the amount of additional tax due. When a taxpayer receives the notice of deficiency, he or she can either pay the full amount of the liability asserted in the notice or file, generally within 90 days of the date

taxpayer elects small tax case procedures⁶; (4) why the taxpayer disagrees with the IRS determinations; and (5) the facts upon which the taxpayer relies. In addition, the taxpayer should attach the notice of deficiency, a request for place of trial, a statement of taxpayer identification number, and the filing fee. The Tax Court follows the mailbox rule: as long as the petition is mailed within the applicable period, it will be considered timely filed, even if it is received by the court outside of the applicable period.

The Tax Court visits 46 states and the District of Columbia, but does not visit Delaware, New Hampshire, New Jersey, or Rhode Island. A taxpayer has the power to designate the location of trial at any of the 59 cities that the Tax Court visits regularly (there are also 14 additional cities where the Tax Court conducts only small tax cases).⁷ The place of trial does not impact venue for appeal, which is determined based on the taxpayer's home address or principal place of business. A taxpayer can use a number of factors for determining the appropriate city for trial including: (1) the taxpayer's residence; (2) location of the taxpayer's witnesses; (3) location of the evidence; (4) the location of the taxpayer's counsel; and (5) any other considerations including privacy, convenience, or strategy. Once a taxpayer designates a place of trial, the taxpayer cannot change the place of trial without permission from the court.

Once a petition is filed in the Tax Court, the case is not immediately assigned to a judge. The case starts out in general docket (i.e., under the supervision of the chief judge). The assistant deputy counsel (ADC), who report to the chief judge, manage these cases. An ADC handles motions, pleadings, and other issues relating to cases in the general docket. Occasionally, motions filed in general docket will be assigned to a judge or special trial judge for resolution. The judge will have a hearing or request additional documentation and will rule on the motion. If the case is not resolved, then it is typically restored to general docket. If a taxpayer's case has not been docketed for trial and he or she calls the Tax Court to resolve an issue, requests information on how to file a pleading, or checks on the status of a matter, the taxpayer will, most likely, speak to an ADC.

The chief judge schedules the court's trial sessions and assigns a specific judge to each city. Once the cities and judges are confirmed, the Tax Court will issue notices setting cases for trial at each of the cities. Typically, Tax Court trial sessions are scheduled for one week, although two weeks is not uncommon for heavily populated areas. When the trial schedule is confirmed, usually about five months before the trial date, the chief judge sends out notices setting cases for trial. He or she attaches the assigned judge's standing pretrial order. Once the chief judge issues the notice setting the case for trial, the case is assigned to a judge and removed from general docket.

Tax Court trial dates are not set in stone. Often cases are scheduled for trial but are not ready to be tried. The parties may be negotiating a settlement, the case may have been referred to IRS Appeals, or complex issues may require additional time for discovery. If the case is not ready for trial, the taxpayer should request a continuance, or, more preferably, meet with IRS counsel and file a joint motion for continuance. If the case will require more than one or two days of trial, it might be best to file a motion for a special session. If the motion is granted, the judge will continue the case from the regular session, retain jurisdiction, and schedule a special session with the parties at a later date. The judge will also be more involved in the case and will usually request conference calls and periodic status reports.

The standing pretrial order gives the taxpayer notice of certain filing deadlines and rules imposed by the assigned judge. It typically requires the parties to communicate, stipulate, exchange documents, and file pretrial memoranda. These requirements embody the Tax Court's distinctive approach to discovery and trial (discussed below). The court can also impose sanctions if a party, or counsel, fails to comply with the standing pretrial order.⁸

Tax Court Discovery

The Tax Court Rules state "the Court expects the parties to attempt to attain the objectives of discovery through informal consultation or communication before utilizing the discovery

Court discovery process is in line with the requirement that the parties prepare stipulations of fact.

When preparing a case for trial, the parties must stipulate to the underlying facts.¹¹ Parties sometimes underestimate the extent of the stipulation process contemplated by the Tax Court. In general, the court wants the parties to stipulate to as many documents and facts as possible. The stipulation should be laid out in a logical, easy-to-follow, manner because the judge will rely on the stipulation when drafting the opinion. Detailed citations to the record are valuable and allow the judge to more easily determine what happened. The parties can, and often do, reserve objections to documents submitted in the stipulation of facts. These objections will be addressed by the court, typically at the start of the trial, but an objection to an exhibit is not grounds for failing to stipulate. The stipulation process can be quite lengthy and time consuming; however, it reduces trial time and helps the parties narrow the issues for decision. When one party is unwilling to stipulate, the other party can file a motion to compel stipulation.

Preparing for Trial

A one-week trial session will typically begin with approximately 100 cases on the docket. The court, however, will be unable to try all of them over a one-week period. As the trial date approaches, the parties communicate pursuant to the pretrial order, and a large percentage of cases are settled. Parties may file motions for continuance or dispositive motions (motions to dismiss or motions for summary judgment), which reduce the number of cases docketed for trial. For example, if a party files a motion for summary judgment and the court determines that the issues are sufficiently complicated and cannot be resolved before trial, then the judge can strike the case from trial and rule on the motion at a later date. Typically, parties will file pretrial memoranda two weeks in advance of trial and a judge will have around 30 to 40 cases remaining in the docket.

Pretrial memoranda allow the parties to present their initial

When preparing a case for trial, the parties must stipulate to the underlying facts. Parties sometimes underestimate the extent of the stipulation process contemplated by the Tax Court. In general, the court wants the parties to stipulate to as many documents and facts as possible. The stipulation should be laid out in a logical, easy-to-follow, manner because the judge will rely on the stipulation when drafting the opinion.

procedures provided in these Rules." In a majority of cases, Tax Court discovery is conducted in an informal manner through what are known as Branerton letters.⁹ Essentially, the parties voluntarily answer each other's questions and provide documentation. The parties must make a meaningful, good faith, attempt to complete informal discovery. If the parties are unable to informally exchange information, Tax Court Rules allow for interrogatories, requests for admissions, depositions (with the consent of the parties), and requests for production of documents.¹⁰ Formal discovery must be completed 75 days before trial. In addition, expert reports must be submitted 30 days before trial. The Tax

arguments to the judge. The taxpayer and the IRS only get one opportunity to make a first impression. The pretrial memorandum provides the opportunity to explain the issues and the law to the judge. A pretrial memorandum will typically include: the amounts in dispute, the status of the case (e.g., probable settlement, probable trial, or definite trial), an estimate of the amount of trial time, anticipated motions or evidentiary problems, the status of the stipulation of facts, and expected witnesses. These elements allow the judge to quickly get a feel for the case. In addition the parties typically include a summary of the issues in the case (including issues that have been resolved), a summary

of facts, and a brief synopsis of legal authorities. When citing facts or cases in a pretrial memorandum, a taxpayer should treat it like a brief. The memorandum should make it as easy as possible for the judge to identify the relevant facts and the appropriate rule of law. These items are critical because they frame the case for the judge. A good pretrial memorandum will show the judge that the party is prepared for trial and will highlight the strengths of the case. When drafting a pretrial memorandum, it is often beneficial to research whether the presiding judge has dealt with similar issues. If he or she has, the taxpayer should be prepared to discuss the cases and should cite them in the memorandum (especially if it is necessary to distinguish them). While the parties are required to file pretrial memoranda, most *pro se* litigants (and the Tax Court has a large percentage of *pro se* litigants) neglect to file pretrial memoranda.

Two weeks before trial, some judges will request conference calls with the parties (especially if a pretrial memorandum indicates that trial is definite or probable). The parties speak directly to the judge, and the judge discusses the issues raised in the memoranda. These conference calls can help the parties to resolve issues and reach a basis of settlement. A large percentage of Tax Court cases settle, and often, despite the pretrial order, the parties have not started discussions prior to a conference call with the judge. Parties can also request conference calls for dispositive motions or discovery issues well in advance of trial. Involving a judge early in the process can often be beneficial.

Tax Court trials can be extremely short. In general, the parties will have submitted an extensive stipulation of facts including most of the relevant documents. In addition, the parties generally do not have many witnesses to call (perhaps an accountant, employer, or employee). At the conclusion of the trial, the judge will provide the parties with a briefing schedule (either simultaneous or seriatim post-trial briefs).

Tax Court Trials

Tax Court trials are typically conducted over a one-week period; however, the parties should be prepared to litigate the case on the first day of the trial calendar. If a taxpayer or witnesses are unavailable on a certain day or extenuating circumstances exist (e.g., the taxpayer had to take off work to drive 100 miles to the courthouse), then the parties should ask for a date and time certain. A judge may not grant the request, but at the very least the court will be aware of limitations. On the first day of trial, the judge will hold a calendar call and will schedule the cases for trial. If the parties are close to a settlement, but need additional time during the week of trial, the judge will typically delay the trial until the end of the session. In addition, if the parties reach a basis of settlement, they should notify the court and will typically receive additional time to file a stipulated decision. After the stipulation process, the parties may realize that the underlying facts are not in dispute and may file a motion to submit the case pursuant to Tax Court Rule 122. If the judge grants the motion, he or she will decide the case based on the stipulation of facts submitted by the parties.

Tax Court trials can be extremely short. In general, the parties will have submitted an extensive stipulation of facts including

most of the relevant documents. In addition, the parties generally do not have many witnesses to call (perhaps an accountant, employer, or employee). At the conclusion of the trial, the judge will provide the parties with a briefing schedule (either simultaneous or seriatim post-trial briefs). The judge may not request briefs or may inform the parties that he or she anticipates issuing an oral bench opinion. Tax Court judges can issue bench opinions at any time during the trial session. These are read directly into the record, and the Tax Court sends the parties a copy after the trial. Bench opinions are nonprecedential.

Post-trial Procedures

Once the parties submit briefs, the judge reviews the record (e.g., stipulation of facts, transcript, expert reports) and drafts an opinion. Opinions are typically issued within one year of trial; however, depending on the complexity of the case and the length of the trial, they may take more than a year. On the date the opinion is released, the court informs the parties and publishes the opinions on the Tax Court website (www.ustaxcourt.gov) after 3:30 p.m. EST.

There are four types of Tax Court opinions: summary opinions, memorandum opinions, division opinions, and court-reviewed opinions. The precedential value of each type varies. Summary opinions have no precedential value and cannot be appealed.¹² Memorandum opinions are not binding authority (although many practitioners, and judges, cite them) because they are typically

fact intensive or recite familiar legal principles.¹³ Division opinions are precedential and typically decide an issue of first impression or an important legal principle. Court-reviewed opinions are precedential, like division opinions, and are similar to *en banc* opinions of a court of appeals.

What can cause an opinion to be delayed? If the case involves a novel issue or the parties request that the court overrule prior precedent, then the case may require a vote of the Court Conference. Typically, the Court Conference reviews reports that purport to overrule prior Tax Court opinions or IRS regulations or reconsider an issue on which the Tax Court was previously reversed. In addition, the court distributes headnotes (i.e., short summaries) of division opinions prior to release. Judges are allowed to request the proposed report and can provide comments. If multiple judges disagree with the outcome of a proposed report, they can request it be designated for Court Conference review. Finally, the day before an opinion is scheduled for release, it is distributed to all of the judges and their clerks. Judges can comment on the opinion and request it be removed from publication. The opinion can then be rewritten, published as a different type of opinion, or designated for Court Conference review.

After an opinion is released, a party can file a motion to recon-

sider. Many cases also require a Tax Court Rule 155 computation, where the parties calculate the taxpayer's proper liability as determined by the opinion. Once the parties submit a computation, the court reviews the computation and enters a decision.

Conclusion

This article provides only a brief overview of the complexities involved in litigating a case before the Tax Court. It is not intended to be all encompassing or definitive. Taxpayers with

Tax Court decisions are not appealable to a general Court of Tax Appeals. Venue on appeal is determined by the taxpayer's residence or principal place of business at the time the petition was filed. Tax Court opinions are reviewed in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury.

The parties can file a motion to vacate a decision within 30 days. The Tax Court decision becomes final 90 days after entry of the decision, unless a party files an appeal (discussed below).

Court Conference

The chief judge selects reports for Court Conference, which takes place about once per month. Two weeks before Court Conference, the proposed report is distributed to all of the judges along with a summary memorandum prepared by the chief judge. In the two weeks leading up to Court Conference, judges discuss and circulate memos in support of, or arguing against, the report. At Court Conference, the authoring judge presents his or her report. The judges discuss the report and then vote on it. For a report to pass Court Conference and become a court-reviewed opinion, it must be approved by a majority of the judges entitled to vote on the report (only presidentially appointed judges are entitled to vote). If a report is voted down, the authoring judge is entitled to rewrite it in accordance with the vote. If the authoring judge chooses not to rewrite the report, the case will be re-assigned to a new judge to draft a report conforming to the opinion of the Court Conference.¹⁴ The new report is also subject to the Court Conference procedures. Occasionally rewritten opinions are discharged from Court Conference and released as memorandum opinions.

Appeals

Tax Court decisions are not appealable to a general Court of Tax Appeals. Venue on appeal is determined by the taxpayer's residence or principal place of business at the time the petition was filed.¹⁵ Tax Court opinions are reviewed in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury. Questions of fact are reviewed for clear error, and questions of law are reviewed *de novo*. The taxpayer's venue on appeal also determines, to some extent, the law that is applied to the case.¹⁶ The *Golsen* rule requires the Tax Court to follow court of appeals decisions, which are squarely on point. This rule leads to an odd situation when a Tax Court opinion has been reversed on appeal. The appellate decision is binding on all subsequent cases where appeal would lie to the same court of appeals and the appellate decision is squarely on point; however, subsequent cases that are not appealable to the same court of appeals remain bound by the previously reversed Tax Court opinion.

90-day letters or with cases in the Tax Court often need a professional to help navigate the process. While Tax Court rules and procedures are intended to assist *pro se* litigants (who litigate a large percentage of all cases before court), Tax Court litigation is complex and intricate. ☉



Nicholas Metcalf is an associate in the tax department of Miller & Chevalier, focusing on the area of federal income tax. Prior to joining Miller & Chevalier, Metcalf served as a law clerk to the Hon. Maurice B. Foley at the U.S. Tax Court. At DePaul University College of Law, Metcalf served as an editor of articles, notes, and comments for the DePaul Law Review. *Admitted in Illinois. Not admitted in the District of Columbia. Practicing under the supervision of a member of the D.C. Bar. Mary Prosser practices in the area of federal income taxation with a focus on tax controversy matters, tax litigation, and transfer pricing. Prosser has represented clients in*



traditional Internal Revenue Service (IRS) examinations and administrative appeals as well as in connection with IRS dispute resolution programs. She has also assisted taxpayers in securing private letter rulings. Additionally, Prosser has represented clients in significant federal tax disputes in the U.S. Tax Court and in federal district court on issues ranging from transfer pricing, research and experimentation credits, and methods of accounting. Prosser has significant substantive knowledge on transfer pricing issues. This includes assisting clients with the negotiation of Advance Pricing Agreements with the IRS and other tax authorities as well as the resolution of disputes through the Competent Authority or MAP process. Prosser also has substantive expertise with respect to tax-exempt organizations, including unrelated business income tax issues and charitable contribution deductions. Prosser is a frequent speaker on transfer pricing issues and administrative practice and procedure at Tax Executive Institute (TEI) chapter meetings and other groups across the country. While at the University of Houston Law Center, Prosser served as an articles editor for the Houston Law Review and was published for her article, "Putting the Public's Trust Back in Zoning: How the Implementation of the

Public Trust Doctrine Will Benefit Land Use Regulation, " 43 *Hous. L. Rev.* 1211 (2006).

Endnotes

¹Internal Revenue Service, Chief Counsel Workload: Tax Litigation Cases, by Type of Case, Fiscal Year 2013, available at www.irs.gov/uac/SOI-Tax-Stats-Chief-Counsel-Workload-Tax-Litigation-Cases-by-Type-of-Case-IRS-Data-Book-Table-27 (last visited May 1, 2014).

²*See id.*

³Tax Reform Act of 1969, P.L. 91-172, §§ 951 and 961.

⁴*See* Section 7447.

⁵The Tax Court also has jurisdiction over a number of other matters including collection due process cases, innocent spouse cases, employment tax cases, whistleblower cases, disclosure actions, and declaratory judgments. The procedures relating to these actions are not discussed in this article.

⁶Small tax case procedures may apply when the amount in dispute (i.e., the deficiency, additions to tax, and penalties) for each year is \$50,000 or less. *See* Section 7463. Small tax case procedures are less formal, and a special trial judge can adjudicate the case. *See* Tax Court Rule 174(b) ("Trials of small tax cases will be conducted as informally as possible consistent with orderly procedure, and any evidence deemed by the Court to have probative value shall be admissible."). Small tax opinions ("summary opinions") are not reviewable by any other court. *See* Section 7463(b).

⁷A full list of cities that the Tax Court visits is available at www.ustaxcourt.gov/forms/Form_5_Request_for_Place_of_Trial.pdf (last visited May 19, 2014).

⁸*See* Tax Court Rule 131.

⁹*Branerton* letters originated with the case of *Branerton Corp.*

v. Commissioner, 61 T.C. 691 (1974). The court did not like that the parties failed to make "reasonable informal efforts to obtain needed information voluntarily." The IRS will typically mail a *Branerton* letter to a taxpayer well in advance of trial.

¹⁰*See* Tax Court Rules 70-72, 90.

¹¹*See* Tax Court Rule 91(a) ("The parties are required to stipulate, to the fullest extent to which complete or qualified agreement can or fairly should be reached, all matters not privileged which are relevant to the pending case, regardless of whether such matters involve fact or opinion or the application of law to fact. Included in matters required to be stipulated are all facts, all documents and papers or contents or aspects thereof, and all evidence which fairly should not be in dispute.").

¹²*See* section 7463(b).

¹³*See John Dunaway v. Commissioner*, 124 T.C. 80, 87 (2005) ("[M]emorandum opinions of this Court are not regarded as binding precedent.")

¹⁴In *Succession of McCord v. Commissioner*, the Court of Appeals for the Fifth Circuit described this procedure as unusual: "The case was tried several months later before Judge Maurice B. Foley, largely on a joint stipulation of facts filed on the day of trial. ... Approximately two years after that trial, the Acting Chief Judge of the Tax Court issued an unusual order that resulted in a proceeding that resembles an en banc rehearing. In essence the case was taken away from Judge Foley retroactively and reassigned to Judge James S. Halpern who, on the same day, filed an opinion on behalf of the majority." 461 F.3d 614 (5th Cir. 2006), reversing and remanding 120 T.C. 358 (2003).

¹⁵*See* Section 7482.

¹⁶*See Golsen v. Commissioner*, 54 T.C. 742, 757 (1970), *aff'd*, 445 F.2d 985 (10th Cir. 1971) ("[J]udicial administration requires us to follow a Court of Appeals decision which is squarely in point where appeal from our decision lies to that Court of Appeals and that court alone.")



The Federal Lawyer
would like to thank
Gertrude Block for her
19 years of contributions
as columnist of
"Language for Lawyers."