AN INTERVIEW WITH

Hon. L. Paige Marvel, Chief Judge, U.S. Tax Court

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The United States Tax Court began its life as the U.S. Board of Tax Appeals, which was established in 1924 as an agency within the Executive Branch. In 1942, the name of the Board was changed to the Tax Court of the United States. In 1969, the current incarnation of the court was established as a legislative court under Article I of the U.S. Constitution. Outside of bankruptcy court, the Tax Court is the only forum where taxpayers can litigate tax matters without having to pay the disputed tax in full. Each year, approximately 30,000 cases are docketed in the Tax Court, with the combined amounts in dispute averaging roughly $20 billion annually. All cases are heard by a judge and there are no jury trials. Tax Court judges are appointed by the president and confirmed by the Senate to serve 15-year terms. The subject of our profile, Hon. L. Paige Marvel, chief judge of the U.S. Tax Court, was first appointed to the court by President Bill Clinton in 1998, was reappointed by President Barack Obama in 2014, and was elected as chief judge by her colleagues for a two-year term effective June 1, 2016.

Q: The Tax Court is, in many ways, very different from other federal courts, and from state and local courts. For example, the Tax Court is unique in that it and its judges come to taxpayers, rather than the other way around. That is, while the Tax Court is headquartered in Washington, D.C., Tax Court judges travel to and preside over cases in dozens of cities throughout the year, so that taxpayers do not need to travel to the capital to have their cases heard. In your view, what are the primary benefits and burdens of having the Tax Court "go on the road"?

A: The Tax Court is a traveling court and the concept of traveling to the taxpayers is embedded in its structure and history. When the court transitioned from an entity within the executive branch to an Article I court of law, the principle that the judges would travel to the taxpayers remained a core part of its statutory structure as a court. The Tax Court sits in 74 cities, where the court either has a field courtroom that it leases from The General Services Administration or a space that it borrows, ideally in a federal courthouse.

The obvious benefits to taxpayers (and in most cases to government counsel as well) include lower litigation costs, greater convenience, and the ability to resolve tax disputes with their government in a familiar geographical area. The burdens fall primarily on the judges and their trial clerks, who must endure the rigors of regular travel at a time when airline seats are getting smaller, meals on flights are going the way of the dodo, security risks are greater, and airlines are sometimes showing remarkably bad judgment in dealing with overbooking.

There are also some benefits to the court's judges and trial clerks as a result of the travel. For example, we learn a lot about an area or region by the types of issues we see in cases tried there. We get to meet local people, try regional food, explore the area or region if time permits, and learn about our country in a way that can only benefit the court as a whole.

Q: Another interesting aspect of the Tax Court is its discovery process, which has some unique characteristics in comparison to, say, the process in federal district courts. How would you characterize the "spirit" of discovery in the Tax Court, and what do you do as a judge to facilitate discovery?

A: I would describe the "spirit" of discovery in the Tax Court, to the extent reflected in the court's Rules of Practice and Procedure, as cooperative and informal. When I see signs that discovery is not going smoothly, and especially when I get several feet of discovery motions and materials, the litigants can almost always expect a conference call so that I can find out what is going on. If I think that one or more of the litigants is not "playing well in the sandbox," I will consider remedial steps such as amending the pre-trial order to place restrictions on discovery. I have even gone so far as to tell the parties that they may not file a discovery motion without my express approval, obtained in advance!

Q: In practical terms, does Tax Court discovery proceed differently for large corporate taxpayers versus pro se or individual taxpayers?

A: I think the answer is almost always yes. The issues in a case brought by a large corporate taxpayer tend to be more complex and the universe of discoverable information is infinitely larger than that typically encountered in a case filed by an individual taxpayer, whether represented or not. That said, the counsel who represent large corporate taxpayers are often skilled and experienced litigators who, if they are on their good behavior, know how to prepare a case for trial in the Tax Court without a lot of "sound and fury."

Although I can't speak from knowledge about all pro se cases, I suspect that in most pro se cases, most types of formal discovery—i.e., interrogatories, requests for production of documents, and depositions—are not used to develop the case for trial. You will see some cases involving pro se petitioners, however, where motions to compel stipulations and/or requests for admissions are used by government counsel in an effort to extract some information from petitioners who are not cooperating.

Q: What are some best and worst practices for attorneys involved in discovery in the Tax Court?

A: Worst practices include, but are not limited to, thoughtless, "scorched earth" discovery, the failure to cooperate in developing a case for trial, the failure to engage in good faith in the stipulation process, inappropriate interrogatory practice, motions to compel that arise from a lack of cooperation, and a failure to abide by the court's rules. Best practices include cooperation in informal discovery, the development of a discovery plan, effective use of the stipulation process to eliminate disputes and identify areas of disputed fact for which testimony may be necessary, judicious use of depositions if and only if necessary, etc.

Q: Certain elements of Tax Court discovery have become more formal in recent years (for example, regarding the availability of depositions). Why the change?

A: As I recall, when I first started to practice in the Tax Court, the court did not allow depositions, except, perhaps, to perpetuate testimony. Over the years, the court has adjusted its approach to discovery based on experience, litigation needs, and discovery practice in the federal district courts. Under the court's earlier discovery rules, which permitted unlimited use of interrogatories but hardly any depositions, it became obvious, at least to some, that a more diverse set of discovery tools would make it easier for the parties to develop their cases in a sensible and orderly manner. At the same time, the court is unwilling to permit depositions unless the parties consent or demonstrate a legitimate need for the deposition. I will point out that taking a deposition with the consent of the parties is a fairly easy process under the court's current rules.

Q: What rules and structures of the Tax Court discovery process would be most surprising to practitioners used to district court discovery?

A: When I was in private practice, I tried cases in the Tax Court and in other federal courts, including the district courts. Although the Federal Rules of Civil Procedure have changed significantly since I was in practice, I think that the most surprising things about the Tax Court's discovery process for a practitioner who has never appeared in the Tax Court would be: (1) the Tax Court's strong emphasis on the stipulation process and on informal discovery to

build the foundation of a case that is to be tried; (2) the relatively limited availability of non-consensual depositions in the Tax Court; (3) the Tax Court's approach to pre-trial discovery of expert witness information and opinions and its unique approach to expert witness testimony at trial; and (4) the Tax Court's approach to formal discovery generally.

Q: Let's talk in a bit more detail about your career and the steps that led to your becoming the chief judge of the Tax Court. When did you decide that you wanted to become a Tax Court judge, and why?

A: I'm not sure that I ever decided I wanted to become a Tax Court judge, at least as a professional goal. I was approached in the early 1980s about several vacancies on the court, but I declined the opportunity to be considered at that time. I felt that I was too young and inexperienced to take a position that I thought required wisdom and broad experience (I was first admitted to the bar in 1974). I was fortunate that another opportunity to be considered for a Tax Court judgeship came along later in my career, at a time when I was willing to consider a change. By that time, I had considerable experience in tax litigation and controversy work, and I knew better what the role of a judge entailed. In 1996 or so, I was invited to apply and I expressed my interest in an appointment. The rest, as they say, is history!

Q: Were there any particular steps you took toward this goal?

A: Because I never had a fixed goal of becoming a Tax Court judge, the answer is no. But I can say that there were things I did during my career that enabled me to develop a resume in support of an appointment. Among other things, I became very active in a variety of bar associations and professional organizations, including the ABA Section of Taxation, the Federal Bar Association Section on Taxation, and the Maryland State Bar Association Tax Section, spoke and wrote extensively, published several book chapters and articles, and used what I was doing professionally to develop a good reputation and great relationships that served me well when I finally applied for the judgeship.

Q: What was the most challenging aspect of transitioning from private practice to the judiciary?

A: For the most part, the transition from private practice to the judiciary was not difficult. But there were some challenges. When you go from a career that consisted solely of representing clients in private practice to a judicial career, you have to find a way to develop your "objectivity" gene so that you can hear evidence, evaluate it dispassionately, make necessary findings of fact, analyze the law, and decide a case fairly. It's important during that process to analyze your philosophy about government and taxpayers and to examine your thinking for any explicit or implicit bias/prejudice. You also have to hone your listening skills, which is very hard to do when you have served as an advocate for 24 years, like I had. I also had a little trouble at the beginning of my judicial career remembering that I was the judge, and not a lawyer, but that is a story for another time!

Q: What skills or habits that you developed in private practice helped you on the bench?

A: Private practice taught me to work hard, tend to my clients diligently, act ethically, research and write competently, and speak in public. All of these have served me well as a judge.

Q: You assumed the role of chief judge in June 2016. What was something surprising that you learned about the Tax Court after becoming chief judge?

A: I was surprised to learn how multifaceted the work of the chief judge is and how little my years of service as a judge had prepared me for some of the Tax Court's most important operational details. As chief judge, you work closely with the clerk of the court regarding all aspects of Tax Court operations, including appropriations, procurement, employee relations, finance, facilities management and maintenance, information systems, and the court's substantive work. My previous experience as a judge gave me little or no experience with the law and regulations applicable to such things as appropriations and procurement, which are both vital to the effective functioning of the court. And because I had never spent time working on the Hill, I had a lot to learn about the legislative and appropriation process as it affects the court. Thankfully, the Tax Court has excellent staff (special thanks to Stephanie Servoss, our clerk, and Anita Rizek, our legislative counsel), and some very knowledgeable judges (e.g., Judge John O. Colvin, Judge Michael B. Thornton, Judge Maurice B. Foley, Judge Elizabeth Crewson Paris, Judge Kathleen Kerrigan, Judge Joseph W. Nega, Judge Cary Douglas Pugh, and Special Trial Judge Daniel A. Guy Jr., to name a few) who assisted materially in my education. I am very grateful to them for their help and support.

Q: What is something that you wish more attorneys knew before appearing before the Tax Court?

A: That's easy—the Tax Court Rules of Practice and Procedure, which should be read carefully and reviewed regularly by lawyers representing litigants before the Tax Court. There is nothing more satisfying to a judge than to know that the lawyers representing litigants in a case know the Rules and are using them to properly prepare a case for settlement or trial. A more nuanced response might emphasize the view that a judge has of the Tax Court from the inside. The judges and employees of the Tax Court work hard to resolve the cases that come before the court in accordance with applicable law. All of us appreciate it when advocates appear on behalf of litigants and we are thrilled when those advocates are competent and professional. The tax system benefits from their help.

Q: In the majority of cases petitioned to the Tax Court, the taxpayer proceeds pro se. What challenges does this present to the Tax Court as an institution and to individual judges?

A: The Tax Court is a court of national jurisdiction where the taxpayers may litigate tax disputes with their government without first having to pay the disputed tax liabilities. That fact alone is probably the primary reason why the vast majority of federal tax cases are filed in the Tax Court. But, because of the Tax Court's history, it is a court designed to enable taxpayers, who either can't afford to hire counsel or prefer not to pay for counsel, to represent themselves. In recent years, approximately 70 percent of all taxpayers who file petitions in the Tax Court are self-represented.

Because of the large pro se or self-represented taxpayer population, the Tax Court has necessarily become one of the most experienced federal courts in managing and hearing cases involving self-represented taxpayers. With a lot of excellent help from the low-income taxpayer clinics (LITCs) and bar association calendar call programs, which are sources of advice and guidance to pro se taxpayers, the court and its judges have developed techniques, tools, and procedures for smoothing out the litigation process and making it understandable to taxpayers.

Those techniques, tools, and procedures include the statutory right of a taxpayer to elect special small case procedures, an increasingly sophisticated and informational website, e-filing, and the ability of judges to issue bench opinions in appropriate cases to expedite the resolution of cases. The court's website contains an instructional video, coaching materials, forms and research tools, a list of LITCs that pro se litigants may contact, and other information to help the litigants understand the litigation process and prepare their cases for trial. Tax practitioners can help the court by volunteering at calendar call through one of the LITCs or bar association calendar call programs.

Tax Court judges have become incredibly skilled in finding ways to help pro se taxpayers prepare their cases for trial. Among the techniques that the judges use are early pre-trial contact with the parties through conference calls, more detailed orders explaining in plain English what a taxpayer must do to prepare for trial or respond to a motion, and selective intervention at trial to assist the parties in developing a proper record.

Q: What are some of the most common pitfalls that pro se litigants face?

A: Some pro se litigants are so afraid of the litigation process that they do nothing until it is too late to adequately prepare their cases for trial. Ignorance is another problem that the court must combat constantly. Many of the programs, tools, and techniques that the court uses are designed to address the fear and ignorance that causes pro se litigants to ignore their obligations to prepare and try their cases.

Q: Can you recall any pro se cases where the taxpayer prevailed in a surprising or interesting fashion?

A: I can recall several memorable cases. The one that I remember the best, however, is a case that I heard in Las Vegas. The taxpayer had recently gotten engaged and he had also been diagnosed with a life-threatening disease. He was before the court on a § 183 issue, involving his investment in the professional golf career of a young woman who turned out to be a natural but untrained golf talent but who also had had a personal relationship with the taxpayer at some point in time. The IRS was understandably suspicious of the taxpayer's claim that he was involved in the activity primarily to make a profit and had developed what turned out to be some misconceptions about the activity. Because the IRS counsel and I took the time, in a pre-trial conference, to talk with the taxpayer and get a better understanding of his position and why he insisted on going to trial, we started the trial knowing more about the issue and the facts that the taxpayer would try to prove. The IRS counsel actually offered at trial to help the taxpayer by asking him questions designed to elicit the testimony important to the taxpayer's case and the taxpayer agreed. Working together they made a great record that enabled the IRS to reevaluate its position. Two weeks after the trial ended, the IRS conceded the case.

Q: Historically, about half of all Tax Court cases are resolved via a Tax Court Appeals Settlement. Another large chunk is disposed of via default or dismissal. Only a small percentage (around 2-3 percent) are actually tried and/or decided by the court. Are there types of cases that are more likely to be decided by the court, either in terms of the substantive tax issues or because of other aspects of the cases?

A: My experience as a judge leads me to conclude that cases involving lots of money are probably more likely to be tried. Cases where either the IRS or the taxpayer is "standing on principle" are probably more likely to be tried as well. So are cases involving issues of first impression, new statutory provisions, transactions identified by the IRS as "problem children," and transfer pricing.

A more interesting question is whether any particular case "needs" to be tried. I do not know what each of my colleagues would say if pressed to opine about whether the cases they have heard "needed" to be tried, but, as a former trial lawyer, I can say that it is not my job as a judge to force or even strongly encourage settlement. My job as a judge is to help the parties prepare their cases for trial, facilitate and encourage settlement discussion where appropriate, and try the cases if the cases do not settle or get resolved in some other way. The court does utilize alternative dispute resolution procedures such as arbitration and mediation, but only in a very few cases do litigants opt for that approach. Probably the single most effective tool for facilitating a settlement is the willingness of the Tax Court judges to be available for conference calls, hearings, pre-trial conferences, etc., so that the parties can "talk to the judge" if an obstacle is encountered. In general, though, it's tough to predict when a case will settle and when it will go to trial.

Back in the 1980s, I did a project for the ABA Tax Section with the objective of finding out why cases that went to trial didn't settle. The project involved going to various cities, watching trials, and then interviewing the parties, with their and the court's permission, to find out why the cases went to trial. The study revealed that, when you cut to the chase, the primary reason why most of the cases went to trial was that the taxpayers wanted to talk to the judge!

Q: Are there types of cases where either the taxpayer or the government is more likely to prevail (e.g., hobby loss cases, transfer pricing cases, economic substances cases, etc.)?

A: I would have to say no. The result in a case that goes to trial is dictated by the relevant facts as found by the court and the sometimes evolving nature of the applicable law. I suspect, however, that there are certain categories of cases where the percentage of victory for a party may be higher or lower depending on which side of the contest the party is on. I'm thinking about cases where the nature of the dispute could affect the statistical probability of success or failure if litigated. An example of this type of dispute might be what is often referred to as a "CDP" or "collection due process" case, where the Tax Court is called upon to conduct a final review before the IRS may proceed with enforced collection of an unpaid tax liability by levy or keep a Notice of Federal Tax Lien in place. Although taxpay-

ers in CDP cases will sometimes get some form of relief, I suspect that, because the underlying tax liability in many CDP cases is not at issue, the government position is sustained in a higher percentage of those cases than might be true, for example, in deficiency cases involving valuations, where it is rare that a party's valuation position is upheld without some adjustment.

Q: While the vast majority of Tax Court cases involve amounts in dispute of less than $100,000, these roughly 23,000 cases (in 2016) represent only about 1 to 2 percent of the total dollars in dispute in all cases. In contrast, the 200 or so cases with amounts in dispute greater than $10 million account for over 80 percent of the total dollars in dispute, or nearly $19 billion. How does the Tax Court handle this volume/value disparity?

A: Because of the court's large population of self-represented petitioners, the Tax Court has always had a split personality as an institution. On the one hand, it functions as a small claims court for tax and utilizes simplified procedures and processes to help litigants prepare and try their cases. On the other hand, the court has, and historically has had, a significant percentage of large and very large cases that involve millions and even billions of dollars in dispute and require a much greater investment of time, money, and judicial resources. Tax Court judges will adjust their approaches to cases depending on the demands that the cases make on the court's resources.

A complex case, typically involving large deficiencies and a lot of potential trial time, may be assigned early to a judge so that the judge can manage and supervise the pre-trial preparation and trial process. These complex cases are time-consuming and are often characterized by significantly more pre-trial discovery, both informal and formal, greater reliance on expert testimony, more motion practice and pre-trial hearings, and a more formal pre-trial and trial process in which the Tax Court's Rules of Practice and Procedure and the Federal Rules of Evidence must be followed. In such cases, the judge will typically issue a customized pre-trial order, often reflecting input from the parties, that specifies deadlines for various actions by the parties, and sets the trial schedule, usually at a special trial session devoted to that case.

That kind of customized case management is not necessary in the majority of cases pending before the court. These small cases—that is, those cases involving tax deficiencies or tax liabilities that do not exceed $50,000 per taxable period—typically do not involve extensive discovery disputes and do not generate a significant number of pre-trial motions (except perhaps a motion for summary judgment or a motion to dismiss for failure to properly prosecute, which we will see if the lawyer representing the government believes that the taxpayer is not properly preparing his or her case for trial). Consequently, the court will manage the cases as part of its general docket and assign them to trial calendars using the court's standardized procedures.

In most instances, the litigants will be notified of the trial session to which their cases are assigned approximately five months before the start of the trial session, and will be given the court's standing pre-trial order, which tells the litigants what they have to do to get ready for trial and by when. The judge who is assigned the trial session will monitor developments in the cases on the trial session calendar, and, if a case has not yet settled, the judge may have one or more conference calls with the parties sometime before the first day of the trial session to minimize disputes, clarify procedures, and explain what the judge expects if the case goes to trial. As a general rule, even for small cases where the taxpayer has not elected S-case status, the pre-trial process and the actual trial for small cases tend to be less formal and less time consuming. If a taxpayer makes an S-case election, the litigants will be subject to a less formal pre-trial and trial process and a relaxed approach to procedural and evidentiary rules.

Q: Do you personally prefer presiding over cases of any particular size or type?

A: I do not have a personal preference based on the size of the case. Small tax cases, the really large and complex cases, and every size case in between can be interesting and challenging, albeit for different reasons. There are certain issues, however, that are less attractive to me. For example, I am not fond of issues, such as valuation issues, that tend to involve a lack of precision and a lot of subjectivity. But, because valuation issues permeate much of what we do as a court, I will happily decide a valuation issue, hoping all the while for a well-developed record that enables me to do my job as a judge.

Q: Please explain how the large cases are assigned to/fall into the laps of particular judges.

A: A judge can acquire a large case in a variety of different ways. The case may be assigned in the ordinary course to one of the judge's trial calendars, but is skimmed off for special handling as the needs of the case, and the required trial time, become more obvious. In some cases, the litigants may file a joint motion for assignment of a judge before a case is calendared for trial that lays out the special management issues the case presents. If the chief judge agrees with the motion, he or she will grant it and assign the case to a judge. The chief judge will consider a variety of factors in making the assignment, including whether a judge volunteers for the case, the judge's workload, whether the case is related to another case(s) assigned to a particular judge, the requested place of trial, and whether cost efficiencies can be achieved by combining or extending trial sessions. A case is never assigned because of some perception that the judge is an "expert" in a particular kind of case.

Q: Let's close by discussing some of the changes and challenges that the Tax Court is dealing with today. In 2015, Congress enacted a series of acts that affected the Tax Court. The Fixing America's Surface Transportation Act expanded the Tax Court's jurisdiction to passport-related actions. The PATH Act, among other things, changed the applicable evidentiary rules in the Tax Court to the Federal Rules of Evidence and clarified appellate venue for certain cases. What steps has the court needed to take to implement the new legislation?

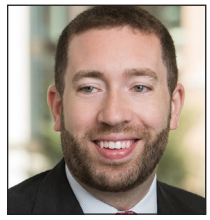
A: Whenever Congress sees fit to give the court new jurisdiction, the court analyzes whether it needs to promulgate new or amended rules of procedure and if so, the court will propose new or amended rules, solicit comments, and finalize those rules. The court will also investigate whether changes are required to the court's filing and case management protocols, and implement any necessary changes.

Q: The IRS's budget has been reduced by almost $1 billion since 2010. Have these cuts affected the operations of the Tax Court or the resolution of cases before the court?

A: In my opinion, yes. The court is seeing a reduction in filings that, I believe, is an indirect consequence of the budget cuts. The IRS compliance presence has been reduced and it is not surprising to me that it is now having an impact on the number of cases filed in the Tax Court and in other federal courts. The budget cuts are also affecting the Appeals Office and the Office of Chief Counsel, which play critical roles in the tax litigation process.

Q: Finally, what do you see as the most significant challenges facing the court today?

A: The Tax Court needs to be nimble while remaining aware of its obligations to provide excellent service to litigants. It must continue to modernize its systems and procedures without sacrificing quality, and it must continue, consistent with its available funding, to protect its systems and the information those systems contain from those who are constantly looking to steal identities and hack computer networks. And, like the rest of the federal government, the Tax Court must continue to be a careful steward of the funding that Congress provides. ⊙



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