



Federal Bar  
Association

# TAX LAW CONFERENCE

March 7-8, 2019

Ronald Reagan Building and International Trade Center  
Washington, D.C.

## Choice of Forum in Tax Disputes



Federal Bar  
Association

# Panelists

- Moderator: Matthew S. Cooper, Senior Manager, Ernst & Young LLP
- Starling Marshall, Special Counsel, Covington & Burling LLP
- Michael Sardar, Partner, Kostelanetz & Fink, LLP
- Jeffrey Dirmann, Associate, Agostino & Associates. P.C.
- David Pincus, Chief of Court of Federal Claims Section, DOJ Tax Division (Only assisted in preparation of slides 11-13) - Any views expressed by Mr. Pincus are his own and should not be taken to represent the institutional views of the Tax Division or the IRS.

# Basics

- District Court and Court of Federal Claims
  - Jurisdiction to award refunds of overpayments
  - Taxpayers must pay the tax and file a timely refund claim for jurisdiction to exist
- US Tax Court
  - Prepayment forum to adjudicate deficiencies
  - Jurisdiction to award overpayments alleged in petition
  - Additional specific grants (e.g., CDP review)
- Concurrent Jurisdiction – IRC § 7422(e)

# Refund Claims – Goal and Form

- Gives IRS opportunity to resolve issue without litigation.
- Formal requirements per Reg. § 301.6402:
  - Separate claim for each type of tax and tax year
  - On Forms 1120X or 1040X for income tax; otherwise Form 843
  - Must state correct year and amount of claim
  - Must “set forth in detail each ground upon which a credit or refund is claimed”
  - Must provide “appropriate supporting evidence”
  - Must demand refund
  - Must be signed under oath
  - Must be filed at the appropriate IRS location

# Refund Claims – Goal and Form

- The IRS may waive formal requirements if it audits the claim.
- A written informal claim tolls limitations period if it expresses TP's intent to seek refund; TP must still perfect claim.
- A protective claim may be filed to preserve TP's rights where its entitlement to the overpayment is uncertain (e.g., pending litigation).

# Refund Claim Issues

- Limitations and lookback periods – § 6511
  - Claim must be filed 3 years from filing of original return or 2 years from payment of tax
  - Claim limited to amounts paid within prior 3 years (if claim filed within 3 years or return) or within prior 2 years otherwise
  - “Deemed” filing and payment rules of § 6513 govern early returns and payments
  - Special rules where assessment period extended and for NOL carrybacks

# Refund Claim Issues

- Proper party to file claim
  - Generally the taxpayer is the real party in interest
  - Parent Co. for consolidated group, except for claims relating to pre-acquisition years
  - A third party who pays the tax of another taxpayer under protest has standing to seek a refund (*Williams*)

# Refund Claim Issues

- Variance
  - Allegations in refund suit cannot vary from legal and factual grounds in refund claim
  - Variance less likely where claim audited
  - Factual variance in *Lockheed Martin* – new R&D costs discovered post-claim not allowed
  - Legal variance in *Computervision*
  - Best practice is to be exhaustive and state alternative grounds



# Refund Claim Issues

- Exceptions to variance doctrine
  - Informal claim
  - Waiver – IRS considers item within limitations period
  - IRS asserts new theory at trial
  - Germaneness – theory relates to facts the IRS examined or should have examined

# Filing Suit

- Timing
  - TP must wait 6 months after filing claim
  - Once claim disallowed, TP may file within 2 years (even if before 6 months)
  - Period starts even if notice defective, provided TP has notice
  - May be extended (Form 907)
- TP must pay tax in full
  - Special rule for divisible taxes

# Litigation In The Court of Federal Claims

## Discovery

- Nationwide Jurisdiction
- Substantial use of Depositions
- Supervised by Trial Judge – No Magistrate Judges

## Settlements

- May be mediated by “A.D.R. Judge”

## Court's Rules

- Based on Fed.R.Civ.P., but see Rule 4 on service of complaint on Rule 9(m) on content of complaints in refund suits

## Trials

- May be held anywhere in the U.S.
- May be divided into sessions
- No jury trials

## Jurisdiction

- Tax Refund-Suit Jurisdiction
- Non-Refund-Suit Jurisdiction under Tucker Act

## Tucker Act Jurisdiction

- Section 1603 of A.R.R.A (grants in lieu of credits)
- Additional overpayment interest claims
- Illegal exaction claims (e.g., F.B.A.R.)
- Statute of limitations is 6 years from accrual of cause of action

# Refund Hot Topics

- Interest cases
  - Tucker Act claims – Alexander Proudfoot (Ct. Cl.); Paresky (Fed. Cl.)
  - Refund claims – Scripps(6<sup>th</sup> Cir.); Pfizer (SDNY)
- Full Payment of Penalties and Interest
- Refund claim penalty – IRC § 6676
  - 20% of “excessive amount”
  - Waived only if TP has “reasonable cause”
- FBAR jurisdictional issues

# US Tax Court

- The United States Tax Court is a court of limited jurisdiction generally prescribed by section 7422, but specific grants of jurisdiction are interspersed throughout the Code.
- Generally, a petitioner to the Tax Court must have received a specific notice from the IRS creating the right to petition the Tax Court.
- Deficiency and other Tax Court cases

# Tax Court – Deficiency Cases

- The Tax Court has jurisdiction to redetermine whether deficiencies for income, estate, or gift taxes determined by the Commissioner are correct.
- A “deficiency” is generally the difference between the corrected tax and the amount of tax shown on the return as filed or as previously assessed. *See* I.R.C. § 6211.
- A notice of deficiency gives the taxpayer 90 days (150 days if addressed to taxpayer outside the U.S.) to file a petition with the Tax Court. I.R.C. § 6213. The Tax Court is a prepayment forum as the taxpayer may dispute the deficiency in the Tax Court before paying any disputed amount.
- The Tax Court can redetermine the deficiency, finding a lesser or greater amount than in the notice, and can find an overpayment. I.R.C. § 6214.



# Tax Court – Nondeficiency Cases

- Claims for relief from joint and several liability (I.R.C. § 6015(e))
- Final partnership administrative adjustments (I.R.C. § 6226)
- Collection due process cases (I.R.C. §§ 6320 & 6330)
- Interest abatement claims (I.R.C. § 6404(i))
- Transferee liability cases (I.R.C. § 6901)
- Actions for administrative costs (I.R.C. § 7430(f)(2))
- Worker classification cases (I.R.C. § 7436)
- Actions to restrain disclosure (I.R.C. § 6110)
- Whistleblower actions (I.R.C. § 7623)
- Declaratory judgments (I.R.C. §§ 6234, 7428, 7436, 7437, 7476, 7477, 7478, 7479)

# Common Tax Court Jurisdictional Issues

- Timely Petition
- Validity of Stat Notice
- Jurisdiction over Party
- Jurisdiction over Each Year and Each Tax
- Validity of Petition
- Payment Before Issuance of Stat Notice

# Tax Court – Refunds/Overpayments

- Generally no IRS refund of tax subject of Tax Court Case.
- Similarly, no taxpayer refund suit for the same taxes and taxable periods that are the subject of the Tax Court litigation.
- Refunds or credits by IRS in the case of a timely Tax Court petition are:
  - (1) Overpayments determined by a final Tax Court decision;
  - (2) Amounts collected in excess of an amount computed under a Tax Court decision;
  - (3) Amounts collected after the collection statute of limitations is expired;
  - (4) Amounts collected by the Service during a period in which collection was barred;
  - (5) Overpayments that the Service is authorized to refund pending appeal; and
  - (6) Overpayments attributable to partnership items.
- Under section 6512(b)(1), the Tax Court has jurisdiction to determine the existence and amount of any overpayment of tax that is to be refunded to the taxpayer for a year that is already before the court in a deficiency case. The ability to determine the overpayment is subject to the look-back period in sections 6511 and 6512(b)(3).

# Concurrent Jurisdiction Under I.R.C. § 7422(e)

- If the taxpayer files a petition in Tax Court based on the notice of deficiency, then the district court or the Court of Federal Claims loses jurisdiction over the case to the extent that the Tax Court acquires jurisdiction.
- If the taxpayer does not file a Tax Court petition, the United States may counterclaim in the district court or the Court of Federal Claims suit even if the normal pleading rules would have rendered a counterclaim untimely.
- Also, the taxpayer has the burden of proof on issues raised in the counterclaim except as to the issue of whether the taxpayer has been guilty of fraud with intent to evade tax.

# Tax Court Hot Topics

- New Issues
  - BBA/TEFRA
  - Passport Actions Under Section 7345
- Premature Petitions (CC Notice 2018-008)
- Managerial Approval of Penalties Under Section 6751(b)
  - Graev
  - Chai

# Choice of Forum Considerations

- Payment of tax
- Appeals and precedents
- Expertise of court
- Home court advantage
- Availability of jury trial
- Raising new issues
- Tax Court rules
- Discovery
- Subpoena power
- Settlement procedures

# Choice of Forum: Court of Federal Claims versus Tax Court

- The Tax Court is the only “prepayment forum.”
  - The IRS’s notice of deficiency (“the bill”) = ticket to Tax Court
  - Option not to pay the asserted tax is often the decisive factor
- The Tax Court has exclusive jurisdiction over some high-volume and particularized issues. E.g.:
  - Review of IRS collection due process (CDP) determinations
  - Review of IRS innocent spouse determinations
  - Review of IRS refusal to abate interest
  - review of IRS decision on an award for administrative costs
- Special relaxed procedures for small cases (<\$50K) usually with pro se litigants
- For the above reasons, the Tax Court hears 95%+ of tax cases.

# Choice of Forum: Court of Federal Claims versus Tax Court

- Conversely, where the taxpayer's claim is predicated on an amended tax return (i.e., a refund), the Tax Court is unavailable absent a deficiency in tax for the same tax period.
- Relevant similarities
  - Both courts have nationwide jurisdiction and subpoena power
  - Both courts will travel to accommodate parties and witnesses
  - Jury trials are not available in either court
- Relevant differences
  - Body of precedent – thorough analysis of Tax Court / relevant circuit vs. Court of
    - Federal Claims / Federal Circuit is required o Key choice-of-forum criterion
  - Formal vs. informal discovery procedures / use of depositions ☐  
Stipulation practice
  - judges and government counsel



# Choice of Forum: Court of Federal Claims versus District Court

- District courts have exclusive jurisdiction over some types of tax cases. E.g.:
  - Summons enforcement and collection actions by the United States
  - Wrongful levy and civil disclosure cases filed by taxpayers
- Body of precedent (again, very important)
- Perceived “home court advantage” for businesses with good local reputations
- Jury trial availability
- Subpoena range
- Relative expertise in tax law
- Potential judges and government counsel