

**MSP  
#20****PRE-TRIAL SETTLEMENTS IN THE U.S. TAX COURT: Insufficient Access to Available Pro Bono Assistance Resources Impedes Unrepresented Taxpayers From Reaching a Pre-Trial Settlement and Achieving a Favorable Outcome****RESPONSIBLE OFFICIALS**

William M. Paul, Acting Chief Counsel  
 Mary Beth Murphy, Commissioner, Small Business/Self-Employed Division  
 Donna Hansberry, Chief, IRS Office of Appeals

**TAXPAYER RIGHTS IMPACTED<sup>1</sup>**

- *The Right to Be Informed*
- *The Right to Challenge the IRS's Position and Be Heard*
- *The Right to Appeal an IRS Decision in an Independent Forum*
- *The Right to Pay No More Than the Correct Amount of Tax*
- *The Right to Retain Representation*
- *The Right to a Fair and Just Tax System*

**DEFINITION OF PROBLEM**

Taxpayers unable to afford representation to defend against a potential IRS assessment or collection action may believe there are only two courses of action: do nothing, or proceed unrepresented.<sup>2</sup> When it comes to civil justice problems involving money or housing, poor households are twice as likely to do nothing than moderate-income households, according to legal scholars.<sup>3</sup>

The U.S. Tax Court is the only prepayment judicial forum for taxpayers to resolve their disputes with the IRS. More than 80 percent of cases in Tax Court are brought by unrepresented taxpayers, and that percentage increases to almost 94 percent among cases where the deficiency for a tax year is \$50,000 or

1 See Taxpayer Bill of Rights (TBOR), [www.taxpayerAdvocate.irs.gov/taxpayer-rights](http://www.taxpayerAdvocate.irs.gov/taxpayer-rights). The rights contained in the TBOR are also codified in the Internal Revenue Code (IRC). See IRC § 7803(a)(3).

2 Unlike in the context of criminal cases, litigants in civil cases with limited means have no right to counsel. See *Gideon v. Wainwright*, 372 U.S. 335 (1963). However, Congress has codified the TBOR, including the *right to retain representation* in dealings with the IRS, which includes the right to seek assistance from a Low Income Taxpayer Clinic (LITC) if the taxpayer cannot afford to hire a representative. See IRC § 7803(a)(3) and TBOR, [www.taxpayerAdvocate.irs.gov/taxpayer-rights](http://www.taxpayerAdvocate.irs.gov/taxpayer-rights).

3 Rebecca L. Sandefur, *The Fulcrum Point of Equal Access to Justice: Legal and Non-Legal Institutions of Remedy*, 42 *Lox. L.A. L. Rev.* 949, 972-973 (2009); see also Marc Galanter, *Why The "Haves" Come Out Ahead: Speculations on the Limits of Legal Change* (1974) 9 *LAW & Soc'y REV.* 95, 99-100, fn. 11 (suggesting modest income claimants less familiar with litigation will be risk averse and consequently less attracted by uncertain gains and more apprehensive about the potential losses of litigation).

---

When it comes to civil justice problems involving money or housing, poor households are twice as likely to do nothing than moderate-income households, according to legal scholars.

---

less and the taxpayer elects small tax case (S Case) procedures.<sup>4</sup> The portion of self-represented litigants in Tax Court is consistent with litigants in civil cases in other state and federal courts.<sup>5</sup>

For over 20 years, Tax Court judges have steadfastly supported programs such as the Clinical, Student Practice & Bar Sponsored Calendar Call Program to bring together unrepresented litigants and representatives offering *pro bono* assistance.<sup>6</sup> More recently, programs such as *Pro Bono Days* seek to encourage resolution of litigation 30 days or more before the scheduled trial date. Despite broad-based institutional support for programs, and high rates of same-day resolution for attendees, taxpayer participation rates remain inconsistent. The National Taxpayer Advocate is concerned efforts to provide unrepresented petitioners access to free, competent advice are being undercut and underused because of ineffective outreach and lack of consistent guidance between the IRS Chief Counsel and *pro bono* representatives which undermine the taxpayers' *rights to be informed, to retain representation, and to a fair and just tax system*, and increases the burden on the Tax Court.

## ANALYSIS OF PROBLEM

### Background

#### *Litigating a Controversy in Tax Court*

A taxpayer can obtain judicial review of an IRS liability determination by the Tax Court, a district court, the U.S. Court of Federal Claims, or the Bankruptcy Court.<sup>7</sup> For a taxpayer unable to afford to hire someone for representation, the Tax Court is particularly accessible because it is the only pre-payment forum for judicial review (other than the Bankruptcy Court).<sup>8</sup> To accommodate the

4 American Bar Association (ABA), Tax Section Court Procedure Committee, Office of Chief Counsel, IRS, fiscal year (FY) 2017 PowerPoint presentation, slides 18, 13. A taxpayer may elect the “small tax case” procedure, known as S case procedures, for cases involving up to \$50,000 in deficiency per year (including penalties and other additions to tax, but excluding interest). S cases have advantages; they are less formal, and can be heard in about 15 more cities than regular cases, [https://www.ustaxcourt.gov/taxpayer\\_info\\_start.htm](https://www.ustaxcourt.gov/taxpayer_info_start.htm).

5 According to *The Justice Index*, a project of the National Center for Access to Justice at the Fordham Law School, as many as two-thirds of litigants appear without lawyers in matters as important as evictions, mortgage foreclosures, child custody and child support proceedings, and debt collection cases in state courts. *The Justice Index 2016*, <http://www.justiceindex.org/> (last visited Sept. 20, 2018). See also Memorandum from Lisa Wood, Chair, ABA Standing Comm. on Legal Aid and Indigent Defendants, to Fin. Comm., Bd. of Dirs., Legal Serv. Corp. 2 (June 2, 2014) (reporting a “trend toward involuntary self-representation”).

6 Keith Fogg, *History of Low-Income Taxpayer Clinics*, 67 *TAX LAW.* 1, 77 (2014).

7 With limited exceptions, taxpayers have an automatic right of appeal from the decisions of any of these courts. See IRC § 7482, which provides that the United States Courts of Appeals (other than the United States Court of Appeals for the Federal Circuit) have jurisdiction to review the decisions of the Tax Court. See also 28 U.S.C. § 1294 (appeals from a United States District Court are to the appropriate United States Court of Appeals); 28 U.S.C. § 1295 (appeals from the United States Court of Federal Claims are heard in the United States Court of Appeals for the Federal Circuit); 28 U.S.C. § 1254 (appeals from the United States Courts of Appeals may be reviewed by the United States Supreme Court).

8 IRC §§ 6212, 6213. The 90-day period becomes 150 days if the notice is mailed to a foreign address. *Id.* The IRS may also assess tax without first sending a notice of deficiency if it determines that collection is in jeopardy. See IRC §§ 6851, 6861, 6862, 6871. The IRS can assess certain “assessable” penalties without sending a notice of deficiency or otherwise triggering the Tax Court’s jurisdiction. For example, the penalties in Subchapter B (i.e., IRC §§ 6671-6725) are expressly excluded from the deficiency process. See IRC § 6671(a); *Smith v. Comm’r*, 133 T.C. 424, 428 n.3 (2009).

numerous unrepresented taxpayers who nonetheless want to exercise their rights, the Tax Court uses rather informal procedures, which are even more relaxed if the disputed issue does not exceed \$50,000.<sup>9</sup> As a result, the Tax Court hears over 90 percent of all federal civil tax cases.<sup>10</sup>

To bring a matter before the United States Tax Court, a taxpayer must act by timely filing a petition with the court. If the IRS proposes a deficiency or seeks to enforce a collection action on a taxpayer and the taxpayer does nothing, the Tax Court will not have jurisdiction over the matter.<sup>11</sup> Approximately five months before each calendar call, the Tax Court sends a notice of trial to each petitioner granted a hearing and to the Commissioner of Internal Revenue, indicating the location and time scheduled for the hearing. Generally, Tax Court calendar calls are held one to two times per year in each city where the Tax Court hears cases, although they can occur more frequently, depending on local need.<sup>12</sup>

To efficiently handle cases, the Tax Court typically schedules many hearings on the first day of a calendar call session. Each party is “called” before the judge to set hearings and trials and schedule the court’s “calendar” for the week. Thus, it is known as a “calendar call.” Some Tax Court hearings are resolved in a matter of minutes, while others take longer.

### *Tax Court Encourages Pro Bono Representation of Pro Se Litigants*

To help bring together *pro bono* counsel and unrepresented taxpayers, the Tax Court established the Clinical, Student Practice & Bar Sponsored Calendar Call Program. Since before 1998, judges have allowed approved representatives offering *pro bono* assistance into their court and announced to petitioners that *pro bono* tax lawyers are available to help them.<sup>13</sup> Under the terms of the program, the Court invites academic and nonacademic tax clinics and state bar sponsored organizations to attend calendar calls, and the presiding judge typically announces the availability of no cost assistance, introduces the group or groups of volunteers, and encourages unrepresented litigants to consult with them. The program has grown and now covers a considerable number of calendar call locations.<sup>14</sup> The majority of organizations participating in the program are Low Income Taxpayer Clinics (LITCs), although other organizations that meet the Court’s eligibility requirements also provide assistance.<sup>15</sup> Students and law graduates working at an LITC may be authorized to represent taxpayers before the IRS.<sup>16</sup>

- 
- 9 IRC § 7463 provides special procedures for small Tax Court cases (where the amount of deficiency or claimed overpayment totals \$50,000 or less) for which appellate review is not available.
- 10 *The Future State of Tax Court Practice and Litigation: An Exploration of Current and Future Issues that Could Affect the Way the Court Does Business*, United States Tax Court Judicial Conference 2 (Chicago, IL Mar. 26–28, 2018) (conference outline).
- 11 The taxpayer must file a timely petition, within 90 days of the deficiency notice’s date (150 days, if the deficiency notice is addressed to a taxpayer outside the U.S.), giving some indication that he contests the deficiency. The taxpayer must attach the deficiency notice to the petition. IRC § 6213(a) and TC Rules 20 – 34. The deficiency notice specifies the deadline for filing the petition. If the deadline is later than 90 days, the later deadline is binding. IRC § 6213(a).
- 12 All 19 Tax Court judges have offices at the court’s Washington, D.C. location. The judges travel to conduct trials in 74 cities nationwide; the Tax Court holds trials only for S cases in 15 of the 74 cities.
- 13 Keith Fogg, *History of Low-Income Taxpayer Clinics*, 67 *TAX LAW.* 1, 77 (2014).
- 14 *Id.*
- 15 See *Requirements for Participation in the United States Tax Court Clinical, Student Practice & Calendar Call Program by Academic Clinics (Law School)*, [https://www.ustaxcourt.gov/clinics\\_academic.htm#SECTION1](https://www.ustaxcourt.gov/clinics_academic.htm#SECTION1).
- 16 The LITC must obtain a special appearance authorization for those students and law graduates from the LITC Program Office. Practice under a special appearance authorization issued by the Director of the LITC Program Office is limited to students and law graduates at an LITC or Student Tax Clinic Program working under the direct supervision of an individual authorized to practice before the IRS.

The Tax Court's primary outreach method for informing petitioners about obtaining legal assistance from local tax clinics and state bar sponsored organizations is the "Stuffer Program." Taxpayers who indicated in their petition that they did not have representation receive information about legal assistance programs from the Tax Court several times:

- With the letter acknowledging receipt of the petition;
- With the notice of trial; and
- 30 days prior to the trial session.

The Tax Court Clinical Student Practice & Bar Sponsored Calendar Call Program provides an opportunity for an unrepresented taxpayer to interact with a *pro bono* attorney. However, an attorney meeting with a client for the first time on the day the case is scheduled to be heard by a judge is not ideal. Unrepresented taxpayers often show up at the calendar call, or at the trial—which the judge may decide to conduct on the same day—unprepared to try a case, or with documents that the taxpayer is presenting to the IRS for the first time. Furthermore, only 25 of the 74 cities where the Tax Court holds trials have a room reserved for persons admitted to practice before the Court, including attorneys associated with tax clinics and Bar sponsored calendar call programs, to meet privately with petitioners.<sup>17</sup> If the parties establish communication prior to the calendar call, they can avoid a host of logistical issues, such as difficulty finding a space to speak privately, being denied access to a federal building because of missing or unacceptable identification, or lack of interpreters.

Some taxpayers contact an LITC or other organization offering aid prior to the calendar call, but many do not. Most taxpayers eligible to receive assistance from an LITC don't even know they exist. According to a 2014 TAS survey of a random sampling of taxpayers eligible to receive LITC assistance, only about 30 percent were aware of an organization outside the IRS that helps taxpayers with IRS problems and only about ten percent of those aware (or about three percent of all taxpayers surveyed) knew the LITC name.<sup>18</sup>

### Litigation Outcomes Show the Importance of Representation as Represented Taxpayers Consistently Fare Better Than Unrepresented

Nearly 27,000 petitions were filed in the Tax Court in Fiscal Year (FY) 2017, and over 22,000 or 83 percent were from unrepresented litigants. Unrepresented taxpayers are more than 2.5 times more likely to have their petition dismissed. For example, in FY 2017, 6,124 *pro se* petitions or about 28 percent were disposed of by default (dismissal) compared to only 411 petitions or less than nine percent of represented taxpayers. Unrepresented taxpayers may have their case dismissed because of a procedural defect and thus are unable to have the court review the merits of their case.<sup>19</sup>

17 See *Requirements for Participation in the United States Tax Court Clinical, Student Practice & Calendar Call Program* by Academic Clinics (Law School), [https://www.ustaxcourt.gov/clinics\\_academic.htm#SECTION1](https://www.ustaxcourt.gov/clinics_academic.htm#SECTION1).

18 See National Taxpayer Advocate 2014 Annual Report to Congress vol. 2 2-26 (Research Study: *Low Income Taxpayer Clinic Program: A Look at Those Eligible to Seek Help From the Clinics*).

19 ABA, Tax Section Court Procedure Committee, Office of Chief Counsel, IRS, FY 2017 PowerPoint presentation.

FIGURE 1.20.1<sup>20</sup>

Tax Court Petitions, FYs 2008-2017

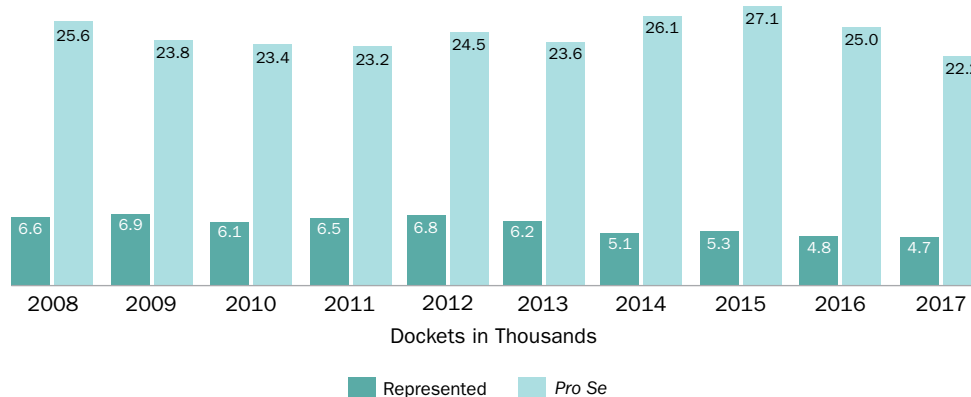
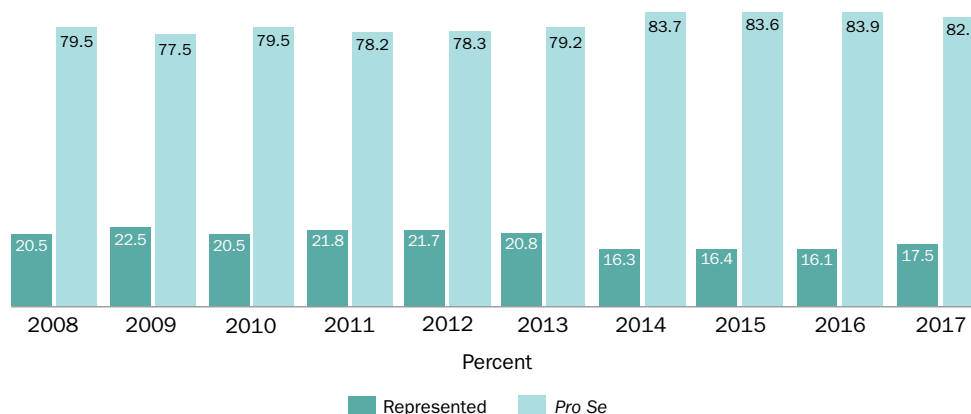


FIGURE 1.20.2<sup>21</sup>

Petitions From Pro Se and Represented Taxpayers, FYs 2008-2017



Many cases that come before the Tax Court involve a proposed deficiency, however even in cases where the IRS was ready to move forward with collection and had mailed a Collection Due Process (CDP) notice, the rates of dismissals and trials are both disproportionately high among unrepresented taxpayers in FY 2017 CDP cases, compared to represented taxpayers, who had disproportionately high rates of reaching a settlement, as shown on Figure 1.20.3. In FY 2017, more than 53 percent of CDP cases with unrepresented taxpayers were dismissed, and about 39 percent settled; compared to 37 percent dismissed and almost 58 percent settled, for represented taxpayers.<sup>22</sup>

20 ABA, Tax Section Court Procedure Committee, Office of Chief Counsel, IRS, FY 2017 PowerPoint presentation, slide 18.

21 *Id.*

22 *Id.*, slide 25.

**FIGURE 1.20.3, Collection Due Process Disposals by Category<sup>23</sup>**

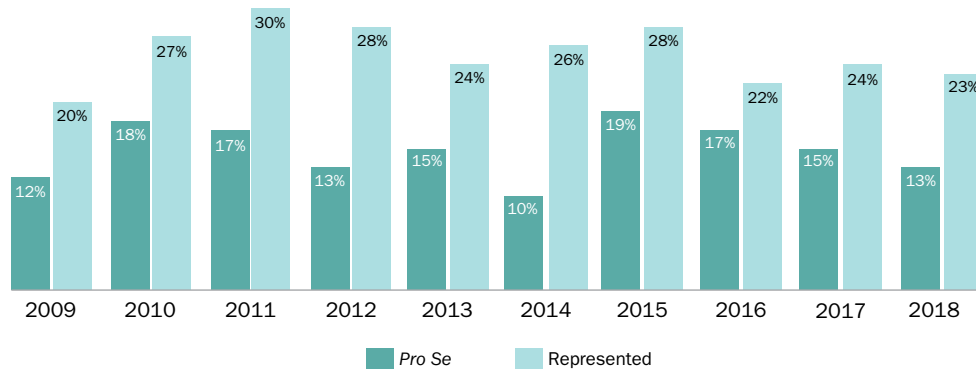
Category	FY08	FY09	FY10	FY11	FY12	FY13	FY14	FY15	FY16	FY17
<b>Settled</b>										
Pro Se	338	451	523	618	617	633	524	483	480	434
Represented	255	353	344	352	455	443	403	338	299	325
<b>Tried-Decided</b>										
Pro Se	111	145	117	137	160	149	87	77	73	83
Represented	33	53	38	37	51	53	38	21	24	28
<b>Dismissed</b>										
Pro Se	454	486	548	615	594	601	611	537	576	595
Represented	108	134	128	132	169	225	213	206	217	211

Even for unrepresented taxpayers that avoid having their petition dismissed, their chances of achieving a favorable outcome aren't as good as taxpayers that are represented. TAS "most litigated issues" analysis shows that unrepresented taxpayers have significantly lesser chances of winning in litigation as shown in Figure 1.20.4.<sup>24</sup>

**FIGURE 1.20.4<sup>25</sup>**

### Litigation Outcomes for Pro Se vs. Represented Taxpayers, 2009-2018

Cases in Which the Taxpayer Prevailed or There Was a Split Decision



For example, during the 2018 reporting period only 13 percent of unrepresented taxpayers prevailed in full or in part compared to 23 percent of represented taxpayers.<sup>26</sup>

<sup>23</sup> ABA, Tax Section Court Procedure Committee, Office of Chief Counsel, IRS, FY 2017 PowerPoint presentation, slide 25.

<sup>24</sup> This is a sample of cases that involve the top ten categories of issues litigated each year in which the court issued an opinion. See Most Litigated Issues: *Introduction, infra*. Many cases are resolved before the court issues an opinion. Some taxpayers reach a settlement with the IRS before trial, while the courts dismiss other taxpayers' cases for a variety of reasons, including lack of jurisdiction and lack of prosecution. Courts can issue less formal "bench opinions," which are not published or precedential.

<sup>25</sup> National Taxpayer Advocate 2005-2017 Annual Reports to Congress, Most Litigated Issues. The annual reporting period is from June 1 of the year preceding the publication to May 31 of the year of the publication.

<sup>26</sup> See Most Litigated Issues: *Introduction, infra*.

---

In FY 2017, more than 53% of Collection Due Process (CDP) cases with unrepresented taxpayers were dismissed, and about 39% settled; compared to 37% CDP cases with represented taxpayers were dismissed and almost 58% settled.

---

### Using *Pro Bono* Days to Facilitate Representation in Tax Court Cases

To ease the pressure of matters that must be resolved at the calendar call, the IRS Office of Chief Counsel (OCC) in collaboration with the Tax Court and LITCs across the country have launched a variety of one-day events, generally known as “*Pro Bono* Days,” that take place 30 days or more before scheduled calendar calls. A *Pro Bono* Day program generally seeks to help unrepresented taxpayers:

- To understand the law applicable to their case;
- Determine the likelihood of prevailing; ease the taxpayer’s reluctance to turn over information the IRS needs in discovery;
- Reach a pre-trial settlement, when possible; and
- Understand the rules of evidence and procedures if a trial is necessary.

A *Pro Bono* Day is a chance for unrepresented petitioners to meet with *pro bono* representatives (such as attorneys, students, and other authorized representatives) in a less chaotic environment than the courthouse at the calendar call. It is also an opportunity for unrepresented taxpayers with a pending petition in Tax Court to meet face-to-face with representatives from IRS Chief Counsel, and sometimes IRS Appeals and IRS Collections.<sup>27</sup> Similarly, *Pro Bono* Day events provide an opportunity for unrepresented petitioners to consult with *pro bono* attorneys, and attorneys and paralegals in IRS Counsel’s office to resolve procedural matters, such as preparing and filing motions for matters agreed upon and stipulations of factual matters.<sup>28</sup>

For IRS attorneys, resolving cases at *Pro Bono* Day events means they do not need to spend time drafting pre-trial memoranda and motions to dismiss for lack of prosecution which they would otherwise have to prepare when they haven’t been able to communicate with the petitioner prior to the scheduled hearing. Attorney involvement on both sides lessens the burden on Tax Court judges, and serves the interests of justice. Even for cases that aren’t resolved at a *Pro Bono* Day that go to trial, the *pro se* petitioners can benefit from a *Pro Bono* Day. For example, in a substantiation case, the volunteers can tell the taxpayer which documents to bring, questions the judge is likely to ask, and facts to get on the record.<sup>29</sup>

---

27 The National Taxpayer Advocate requested that TAS participate in *Pro Bono* Days to help resolve issues with years not before the court or collection matters following settlement.

28 Stipulations are facts, opinions, and legal positions on which the parties agree in writing, and thus do not need to be proven at trial.

29 Nathan J. Richman, *Pro Bono Clinic Days Offer New Option to Help Pro Se Petitioners*, TAX ANALYSTS, 2016 TNT 63-2 (Apr. 1, 2016).

*Pro Bono* Day efforts are heavily dependent upon the support of volunteers, from both the IRS and the local tax practitioner community. Out of 74 cities where the Tax Court holds trials,<sup>30</sup> IRS Counsel has helped *Pro Bono* Day efforts with varying success rates in:

- Baltimore, Maryland;
- Chicago, Illinois;
- Los Angeles, California;
- Thousand Oaks, California;
- Miami, Florida;
- Dallas, Texas;
- Charleston, West Virginia; and
- Seattle, Washington.

In one recent *Pro Bono* Day in Thousand Oaks, California, all the taxpayers who attended resolved their cases on the day of the event.<sup>31</sup>

No matter how well the events work for those taxpayers who take advantage of *Pro Bono* Day events, true success cannot be achieved without sufficient taxpayer participation. However, despite broad-based institutional support for *Pro Bono* Day events, and high rates of same-day resolution for attendees, participation rates among the events are inconsistent. One of the greatest challenges to the success of *Pro Bono* Day events is informing unrepresented taxpayers about them while maintaining the confidentiality of each taxpayer's personal information.

Rules to protect the confidentiality of taxpayers' personal information limit the ways in which taxpayers can be contacted.<sup>32</sup> The IRS and the court may communicate with unrepresented taxpayers to make them aware of available assistance, however, the independent organizations offering assistance do not have ready access to contact information for the petitioners, and thus cannot contact taxpayers directly. Low income taxpayers tend to be a transient population and change addresses more frequently than other taxpayers, which increases the challenge of establishing communication. Some taxpayers are reluctant to communicate with the IRS, and remain unaware that assistance may be available to help them with their pending case.<sup>33</sup>

IRS Counsel attempts to reach unrepresented petitioners by sending out letters informing them about LITC and TAS assistance and by following up with phone calls. The *Pro Bono* Day's sponsors jointly craft a letter for the IRS to send out to *pro se* petitioners, usually four or five weeks before the *Pro Bono* Day.<sup>34</sup> Although the letters are not standardized, the format is generally the same. The letter, accompanied by an IRS cover letter, describes the opportunity for free help from volunteer attorneys or law students to review documents and discuss the issues, including the chance to communicate with the IRS about resolving the issues, and directs interested petitioners to contact an LITC to schedule

30 See *United States Tax Court Places of Trial*, [https://www.ustaxcourt.gov/dpt\\_cities.htm](https://www.ustaxcourt.gov/dpt_cities.htm).

31 Email from Julie Payne, Assistant Division Counsel, IRS (Sept. 7, 2018) (on file with TAS).

32 See IRC § 6103.

33 See National Taxpayer Advocate 2010 Annual Report to Congress 221 (Most Serious Problem: *The IRS Has Not Studied or Addressed the Impact of the Large Volume of Undelivered Mail on Taxpayers*).

34 Nathan J. Richman, *Pro Bono Clinic Days Offer New Option to Help Pro Se Petitioners*, TAX ANALYSTS, 2016 TNT 63-2 (Apr. 1, 2016).



appointments.<sup>35</sup> The IRS must mail the letter because it cannot provide the petitioners' addresses to the clinics and volunteer programs under IRC § 6103 disclosure rules. The letter is distinct from the stuffer notices the court sends out informing petitioners about the Tax Court Clinical Program.<sup>36</sup>

We identified the following challenges affecting *pro se*<sup>37</sup> taxpayers' ability to consult with *pro bono* counsel and resolve cases pre-trial:

- Confidentiality restrictions that limit communication with unrepresented taxpayers about *Pro Bono* Day and other pre-trial resolution events by local LITCs and TAS;
- Limited availability of easily accessible but private meeting spaces for taxpayers experiencing difficulties with security and building access and *pro bono* resolution events scheduled outside of regular business hours;
- Insufficient staffing and unavailability of interpreter services at *Pro Bono* Days and other pre-trial resolution events; and
- Inadequate coordination of events reducing opportunities to offer one-stop resolution options for unrepresented petitioners.

## Addressing *Pro Bono* Day Challenges

### *Increasing Awareness*

*Pro Bono* Day programs could be improved to reach more eligible taxpayers and increase attendance rates. Effective communication with unrepresented petitioners is essential to ensuring they achieve quick and fair resolution of their tax issues. IRS counsel traditionally uses phone calls and mailed letters as the primary methods of communicating with taxpayers that have an upcoming hearing scheduled in the Tax Court. The IRS has attempted several different strategies to improve response rates from attempts to reach unrepresented taxpayers, such as using distinct types of envelopes and sending correspondence at various times between the time the taxpayer files a Tax Court petition and the date of the hearing. However, a taxpayer that has made the decision to take his case to the Tax Court may not be receptive to additional correspondence from the IRS, and may not believe that the IRS is attempting to put the taxpayer in contact with independent counsel. The National Taxpayer Advocate may conduct a study to determine the effectiveness of mailing letters to a representative sample of low income taxpayers who have filed petitions with the Tax Court and who appear to be unrepresented. Such letters would inform the taxpayers about LITCs, and TAS and the assistance they can provide.

Other methods to communicate with Tax Court petitioners might be more effective, but would require the Tax Court to modify its petition form. The Tax Court petition package (available on the Tax Court website)<sup>38</sup> contains several check-the-box selections for the petitioner to indicate the choice for small or regular case classification, requested location of the trial, and other critical information. If the Tax Court added a question for petitioners to indicate their consent to being contacted by an LITC, it would allow organizations offering *pro bono* assistance additional opportunities to reach taxpayers without

35 Nathan J. Richman, *Pro Bono Clinic Days Offer New Option to Help Pro Se Petitioners*, TAX ANALYSTS, 2016 TNT 63-2 (Apr. 1, 2016).

36 *Id.*

37 “*Pro se*” means “for oneself; on one’s own behalf; without a lawyer.” BLACK’S LAW DICTIONARY (10th ed. 2014).

38 U.S. Tax Court Petition Kit, [https://www.ustaxcourt.gov/forms/Petition\\_Kit.pdf](https://www.ustaxcourt.gov/forms/Petition_Kit.pdf).

needing to use the IRS as the messenger. Unrepresented taxpayers could indicate their preferred method of communication: phone calls, letters, or email.<sup>39</sup>

### *Making Assistance Accessible*

Increasing awareness of *Pro Bono* Day events is not the only challenge to their success. Most importantly, the IRS needs to hold the events at locations that offer accessibility and privacy. Taxpayers must be able to get to the event, and once a taxpayer is ready to meet with *pro bono* counsel and the IRS, the locations should provide space for private discussions. In some locales where the Tax Court holds trials there is an LITC nearby that can accommodate hosting the event, however in some parts of the country the nearest LITC might be several hours drive so other locations must be considered. The IRS can and should collaborate with partners to secure such locations. For example, holding the event at a local community center, as opposed to an IRS office in a federally operated building reduces the risk that someone might feel intimidated or be turned away by building security.<sup>40</sup>

Given that many low income taxpayers are not fluent in English, many localities would require the availability of interpreting services to be able to fully assist these taxpayers. The IRS should provide interpreting services to taxpayers unable to communicate in English through over-the-phone interpreters<sup>41</sup> or by partnering with local organizations offering interpretation services.<sup>42</sup>

Proper scheduling of *Pro Bono* Day events may also maximize attendance. Holding the events during evenings and on weekends can make it easier for petitioners to attend, however the IRS must depend on some employees to agree to work outside of their tour of duty which in turn requires permission from their supervisors. The IRS should adopt a national policy that authorizes employees willing to work at night or on weekends for a *Pro Bono* Day, instead of relying on individual managers to decide. The IRS has a dedicated workforce and may recruit employees for *Pro Bono* events after hours. TAS is offering its assistance to coordinate such events with different IRS functions, such as Collection, Appeals, and Office of Chief Counsel. In a move towards future collaboration, the National Taxpayer Advocate is collaborating with the Chief, Appeals and Deputy Chief Counsel (Operations) to organize a new liaison group with members from TAS, Appeals, OCC, and LITCs to identify and resolve issues that stand in the way of eligible taxpayers being able to receive assistance and other taxpayer rights issues.<sup>43</sup>

### *Offering One-Stop Resolution Options for Unrepresented Petitioners*

*Pro Bono* Day events should be organized to provide one-stop resolution of all IRS issues and tax periods. To be most effective, representatives from local IRS Counsel, Appeals, Collection, and TAS should

39 See also Most Serious Problem: *Statutory Notices of Deficiency: The IRS Fails to Clearly Convey Critical Information in Statutory Notices of Deficiency, Making it Difficult for Taxpayers to Understand and Exercise Their Rights, Thereby Diminishing Customer Service Quality, Eroding Voluntary Compliance, and Impeding Case Resolution*, *supra*.

40 See National Taxpayer Advocate 2012 Annual Report to Congress 176. Representatives of LITCs raised concerns about the requirement of many Taxpayer Assistance Centers (TACs) or federal buildings in which some TACs are located to produce a valid, U.S.-issued ID to enter the building. 2013 Annual LITC Grantee Conference, *Recent Developments in IRS Policies and Procedures Related to ITIN Applications*, panel discussion (Dec. 6, 2012).

41 Over the Phone Interpreter (OPI) service is a telephone interpreter-assisted service provided through the IRS by a contractor. OPI affords IRS employees the ability to communicate with taxpayers through interpreters who speak more than 350 languages. OPI Service is available 24 hours per day/7 days per week. It supports the IRS's mission to provide top-quality service for all taxpayers, specifically for those whose native language is not English. This is in compliance with Executive Order 13166, as well as Department of Justice LEP Guidance 67 FR 41455-41472, Department of Treasury LEP Guidance 70 FR 6067, and the TBOR.

42 See IRM 22.31.1, *IRS Language Services* (Oct. 19, 2018).

43 The liaison group held its first meeting on December 4, 2018 at the LITC Annual Conference in Washington, D.C.

attend each *Pro Bono* Day event to resolve disputes pre-trial. Bringing together a broad spectrum of IRS functions allows for resolution of more types of issues, even the many cases where the taxpayer will be unable to pay anything to the IRS, regardless of the outcome of the case. Moreover, many taxpayers with issues before the court also have issues relating to tax years not before the court. By having TAS and other functions available, *Pro Bono* Days can address all the taxpayer's issues, in a face-to-face environment.<sup>44</sup>

We commend the IRS OCC for attempting a variety of formats for helping unrepresented taxpayers resolve cases pre-trial, such as post-petition rolling clinics,<sup>45</sup> invitations to one-on-one meetings, in-person events in IRS space and in LITC space, and virtual clinics where LITCs equipped with video conferencing allow petitioners to meet virtually with TAS, Collection, and Exam employees using WebEx or other virtual service delivery models. Using technology like WebEx allows a taxpayer to have a virtual face to face interaction from a computer or even a smartphone and eliminates difficulties associated with traveling to the court building or difficulties accessing federal buildings because of missing or unacceptable identification.<sup>46</sup> Expanding virtual face-to-face digital communication options for taxpayers may improve participation and protect *the right to a fair and just tax system* and to *appeal an IRS decision in an independent forum*.

If implemented holistically, all these measures would tailor services to meet the needs of this discrete group of taxpayers, systemically improving access to representation and future tax compliance.<sup>47</sup>

## CONCLUSION

Increasing awareness of available resources for unrepresented taxpayers, such as LITCs and TAS, benefits taxpayers by achieving better case outcomes, and allows the IRS and the Tax Court to resolve cases more efficiently, and pre-trial, whenever possible. Holding *Pro Bono* Days allows the Chief Counsel and IRS to provide a unique opportunity for petitioners to resolve their cases via a face-to-face interaction with the Chief Counsel and IRS employees with the benefit of independent counsel looking out for the taxpayers' interests and ensuring taxpayer rights are protected. Doing that successfully requires cross-functional collaboration across IRS functions and careful planning that meets taxpayer needs for accessibility and privacy.

44 Using a similar model, TAS conducts Problem Solving Day events in communities throughout the country where TAS employees from a local office are available to assist taxpayers in person with tax problems they have not been able to resolve with the IRS. During calendar year 2018, TAS assisted 5,959 taxpayers at 427 Problem Solving Day events.

45 "If the calendar is not filled with cases when scheduled six months before trial, the Tax Court could continue to add cases until five months prior to the start of the trial session or until the calendar is full. A rolling calendar would in many cases give the parties additional time to prepare for trial, while not requiring taxpayers who reside in trial locations that are visited less often to wait the additional time to have their cases heard." ABA, Section of Taxation, *Comments on Tax Court Rules of Practice and Procedure* (Nov. 10, 2015).

46 See Nathan J. Richman, *Pro Bono Clinic Days Offer New Option to Help Pro Se Petitioners*, TAX ANALYSTS, 2016 TNT 63-2 (Apr. 1, 2016); Meeting Minutes, LITC/CC/SBSE Working Group (June 13, 2017).

47 See Thomas Dohrmann & Gary Pinshaw, McKinsey & Company, *The Road to Improved Compliance: A McKinsey Benchmarking Study of Tax Administrations – 2008 -2009* (Sept. 2009).

## RECOMMENDATIONS

The National Taxpayer Advocate recommends that the IRS:

1. Adopt alternative methods for communicating with unrepresented Tax Court petitioners, including working with the Tax Court to modify the petition form to allow taxpayers to consent to direct contacts from local LITCs and TAS.
2. Hold more events to encourage pre-trial resolution in easily accessible but private locations and schedule the events outside of regular business hours as necessary.
3. Provide staffing at *Pro Bono* Days and other pre-trial resolution events that can provide interpreting services.
4. Develop one-stop resolution options for *pro se* petitioners at *Pro Bono* Days and other pre-trial resolution events to include representatives from Appeals, Collection, and TAS, along with inviting local LITC or Bar Association volunteers or staff and assigning counsel attorneys from the same locality.