

MOST LITIGATED ISSUES: Introduction

Internal Revenue Code (IRC) § 7803(c)(2)(B)(ii)(X) requires the National Taxpayer Advocate to identify in her Annual Report to Congress (ARC) the ten tax issues most litigated in federal courts (Most Litigated Issues).¹ The National Taxpayer Advocate may analyze these issues to develop recommendations to mitigate the disputes resulting in litigation.

The Taxpayer Advocate Service (TAS) identified the Most Litigated Issues from June 1, 2012, through May 31, 2013, by using commercial legal research databases. For purposes of this section of the Annual Report, the term “litigated” means cases in which the court issued an opinion.² This year’s Most Litigated Issues in descending order are:

- Accuracy-related penalty (IRC § 6662(b)(1) and (2));
- Trade or business expenses (IRC § 162(a) and related Code sections);
- Gross income (IRC § 61 and related Code sections);
- Summons enforcement (IRC §§ 7602(a), 7604(a), and § 7609(a));
- Collection due process (CDP) hearings (IRC §§ 6320 and 6330);
- Failure to file penalty (IRC § 6651(a)(1)), failure to pay penalty (IRC § 6651(a)(2), and estimated tax penalty (IRC § 6654);
- Charitable deductions (IRC §170);
- Frivolous issues penalty (IRC § 6673 and related appellate-level sanctions);
- Civil actions to enforce federal tax liens or to subject property to payment of tax (IRC § 7403); and
- Relief from joint and several liability for spouses (IRC § 6015).

The majority of these issues were identified as Most Litigated Issues last year, with the exception of charitable deductions.³ Accuracy-related penalties became the top issue this year, continuing the trend from 2011 to 2012, which saw a 113 percent increase in cases, followed by a gain of another 52 percent in 2013.⁴ The number of CDP cases fell slightly this year after a significant increase in 2012, dropping from 116 cases in 2012 to 105 in 2013.⁵ Civil actions to enforce federal tax liens or to subject property to payment of tax saw the largest decrease in cases, with 48 cases in 2012 and 33 in 2013, a 31 percent decrease.⁶

1 Federal tax cases are tried in the United States Tax Court, United States District Courts, the United States Court of Federal Claims, United States Bankruptcy Courts, United States Courts of Appeals, and the United States Supreme Court.

2 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. Additionally, courts can issue less formal “bench opinions,” which are not precedential. The more significant bench opinions are available through www.ustaxcourt.gov.

3 See National Taxpayer Advocate 2012 Annual Report to Congress 560.

4 See *id.* at 563, Table 3.0.1; National Taxpayer Advocate 2011 Annual Report to Congress 589.

5 See *id.*

6 See *id.*

Once TAS identified the Most Litigated Issues, it analyzed each one in four sections: summary of findings, description of present law, analysis of the litigated cases, and conclusion. Each case is listed in Appendix III, which categorizes the cases by type of taxpayer (*i.e.*, individual or business).⁷ Appendix III also provides the citation for each case, indicates whether the taxpayer was represented at trial or argued the case *pro se* (*i.e.*, without representation), and lists the outcome.⁸

We have also included a “Significant Cases” section summarizing decisions that are not among the top ten issues but are important to tax administration.⁹ This year, the Significant Cases discussion includes two decisions issued by the Supreme Court.¹⁰

AN OVERVIEW OF HOW TAX ISSUES ARE LITIGATED

Initially, taxpayers can generally litigate a tax matter in four different fora:

- The United States Tax Court;
- United States District Courts;
- The United States Court of Federal Claims; and
- United States Bankruptcy Courts.

With limited exceptions, taxpayers have an automatic right of appeal from final decisions of any of these courts.¹¹

The Tax Court is generally a “prepayment” forum. In other words, taxpayers can access the Tax Court without first having to pay the disputed tax. The Tax Court has jurisdiction over a variety of issues, including deficiencies, certain declaratory judgment actions, appeals from collection due process hearings, relief from joint and several liability, and determination of employment status.¹²

The United States District Courts and the United States Court of Federal Claims have concurrent jurisdiction over tax matters in which (1) the tax has been assessed and paid in full,¹³ and (2) the taxpayer has filed an administrative claim for refund.¹⁴ The United States District Courts, along with the bankruptcy courts in very limited circumstances, provide the only fora in which a taxpayer can receive a jury

⁷ Individuals filing Schedules C, E, or F are deemed business taxpayers for purposes of this discussion even if items reported on such schedules were not the subject of litigation.

⁸ “*Pro se*” means “for oneself; on one’s own behalf; without a lawyer.” *Black’s Law Dictionary* (9th ed. 2009). For purposes of this analysis, we considered the outcome of the case with respect to the issue analyzed only. A “split” decision is defined as a partial allowance on the specific issue analyzed. The citations also indicate whether decisions were on appeal at the time this report went to print.

⁹ One of the cases discussed in the “Significant Cases” section of this report was decided outside the June 1, 2012, through May 31, 2013, period used to identify the ten most litigated issues, but we nonetheless have included it because of its impact on tax administration.

¹⁰ *United States v. Windsor*, 133 S. Ct. 2675 (2013), *aff’g* 699 F.3d 169 (2d Cir. 2012), *aff’g* 833 F. Supp. 2d 394 (S.D.N.Y. 2012) and *PPL Corp. v. Comm’r*, 133 S. Ct. 1897 (2013), *rev’g* 665 F.3d 60 (3d Cir. 2011), *rev’g* 135 T.C. 304 (2010).

¹¹ 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. There are exceptions to this general rule. For example, 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. 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).

¹² IRC §§ 6214; 7476-7479; 6330(d); 6015(e); 7436.

¹³ 28 U.S.C. § 1346(a)(1). See *Flora v. United States*, 362 U.S. 145 (1960), *reh’g denied*, 362 U.S. 972 (1960).

¹⁴ IRC § 7422(a).

trial.¹⁵ Bankruptcy courts can adjudicate tax matters that were not adjudicated prior to the initiation of a bankruptcy case.¹⁶

ANALYSIS OF *PRO SE* LITIGATION

As in previous years, many taxpayers appeared before the courts *pro se*. Table 3.0.1 lists the Most Litigated Issues for the review period of June 1, 2012, through May 31, 2013, and identifies the number of cases, broken down by issue, in which taxpayers appeared without representation. As the table illustrates, the issues with the highest rates of *pro se* appearance are summons enforcement and the frivolous issues penalty.

TABLE 3.0.1, *Pro Se* Cases by Issue

Most Litigated Issue	Litigated Cases Reviewed	<i>Pro Se</i> Litigation	Percentage of <i>Pro Se</i> Cases
Accuracy-Related Penalty	178	100	56%
Trade or Business Expenses	134	86	64%
Gross Income	117	71	61%
Summons Enforcement	117	91	78%
Collection Due Process	105	70	67%
Failure to File, Failure to Pay, and Estimated Tax Penalties	86	53	62%
Charitable Deductions	40	18	45%
Frivolous Issues Penalty (and related appellate-level sanctions)	36	35	97%
Civil Actions to Enforce Federal Tax Liens or to Subject Property to Payment of Tax	33	18	55%
Joint and Several Liability	31	11	35%
Total	877	553	63%

Table 3.0.2 affirms our contention that overall, taxpayers are more likely to prevail if they are represented. However, in cases involving relief from joint and several liability for spouses under IRC § 6015, it is interesting to note that taxpayers who appeared *pro se* were far more likely to prevail than taxpayers who were represented. The IRS and taxpayers would benefit from resolving these cases administratively rather than forcing taxpayers to seek relief through the courts.

¹⁵ The bankruptcy court may only conduct a jury trial if the right to a trial by jury applies, all parties expressly consent, and the district court specifically designates the bankruptcy judge to exercise such jurisdiction. 28 U.S.C. § 157(e).

¹⁶ See 11 U.S.C. § 505(a)(1) and (a)(2)(A).

TABLE 3.0.2, Outcomes For Pro Se and Represented Taxpayers

Most Litigated Issue	Pro Se Taxpayers			Represented Taxpayers		
	Total Cases	Taxpayer Prevailed in Whole or in Part	Percent	Total Cases	Taxpayer Prevailed in Whole or in Part	Percent
Accuracy-Related Penalty	100	20	20%	78	19	24%
Trade or Business Expenses	86	19	22%	48	16	33%
Gross Income	71	12	17%	46	5	11%
Summons Enforcement	91	1	1%	26	5	19%
Collection Due Process	70	7	10%	35	10	29%
Failure to File, Failure to Pay, and Estimated Tax Penalties	53	7	13%	32	8	25%
Charitable Deductions	18	1	6%	22	7	32%
Frivolous Issues Penalty (and related appellate-level sanctions)	35	12	34%	1	1	100%
Civil Actions to Enforce Federal Tax Liens or to Subject Property to Payment of Tax	18	0	0%	15	3	20%
Joint and Several Liability	11	6	55%	20	5	25%
Total	553	85	15%	323	79	24%