

INTRODUCTION: Most Litigated Issues

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.

TAS identified the Most Litigated Issues from June 1, 2015, through May 31, 2016, 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 are:

- Accuracy-Related Penalty (IRC § 6662(b)(1) and (2));³
- Appeals From Collection Due Process (CDP) hearings (IRC §§ 6320 and 6330);
- Summons Enforcement (IRC §§ 7602(a), 7604(a), and 7609(a));
- Gross Income (IRC § 61 and related Code sections);
- Trade or Business Expenses (IRC § 162(a) and related Code sections);
- Failure to File Penalty (IRC § 6651(a)(1)), Failure to Pay Penalty (IRC § 6651(a)(2)), and Failure to Pay Estimated Tax Penalty (IRC § 6654);
- Civil Actions to Enforce Federal Tax Liens or to Subject Property to Payment of Tax (IRC § 7403);
- Charitable Deductions (IRC § 170);
- Frivolous Issues Penalty (IRC § 6673 and related appellate-level sanctions); and
- Trust Fund Recovery Penalty (IRC § 6672).⁴

All of these issues were identified as Most Litigated Issues last year, with the exception of the trust fund recovery penalty, which replaced relief from joint and several liability for spouses as the tenth most litigated issue.⁵ This issue last appeared in a Most Litigated Issues section in 2005.⁶ Accuracy-related penalties remained the top litigated issue this year, and we identified 122 cases, nine more than the 113 cases we identified last year.⁷ This works out to an eight percent increase, the second largest increase in any category of cases. CDP cases experienced the largest percentage increase, as we identified 99 cases this year compared with 79 cases last year, a 25 percent increase.⁸ We also observed declines from last year of more than 25 percent in three categories of cases. The number of failure to file, failure to pay, and failure

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. Courts can issue less formal “bench opinions,” which are not published or precedential.

3 Internal Revenue Code (IRC) § 6662 also includes (b)(3), (b)(4), (5), (6), (7), and (8), but because those types of accuracy-related penalties were not heavily litigated, we have only analyzed (b)(1), and (2).

4 In addition to the cases we identified in the ten Most Litigated Issues, we identified 42 cases under IRC §§ 7407 and 7408, which involve United States District Court actions to enjoin tax return preparers, and actions to enjoin specified conduct related to tax shelters and reportable transactions, respectively. However, because the majority of these cases did not involve substantive decisions on the merits, we did not include this category of cases in our Most Litigated Issues section.

5 See National Taxpayer Advocate 2015 Annual Report to Congress 426.

6 *Id.* at 543.

7 *Id.* at 429.

8 *Id.* at 481.

to pay estimated tax penalty cases dropped from 63 to 45, a 29 percent decrease, the largest percentage drop in any category.⁹ Cases involving civil actions to enforce federal tax liens decreased from 44 to 32, a 27 percent decrease.¹⁰ Finally, the number of trade or business expense cases dropped from 99 to 73, a 26 percent decrease.¹¹

Overall, the total number of cases identified in the Most Litigated Issues section dropped from 640 in 2015 to 609 this year, a five percent decrease from last year,¹² and continuing the downward trend in the number of cases over the last few years.¹³ We also noticed a slight dip from last year in the percentage of cases involving *pro se* taxpayers, as 60 percent of cases involved *pro se* taxpayers as compared to 62 percent in 2015.¹⁴

Once TAS identified the Most Litigated Issues, we analyzed each one in five sections: summary of findings, taxpayer rights impacted, description of present law, analysis of the litigated cases, and conclusion.¹⁵ Each case is listed in Appendix 3, which categorizes the cases by type of taxpayer (*i.e.*, individual or business).¹⁶ Appendix 3 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 court's decision.¹⁷

We have also included a “Significant Cases” section summarizing decisions that are not among the top ten issues but are relevant to tax administration. In this section, we used the same reporting period, beginning on June 1, 2015, and ending on May 31, 2016, that we used for the ten Most Litigated Issues.

9 See National Taxpayer Advocate 2015 Annual Report to Congress 499.

10 *Id.* at 509.

11 *Id.* at 459.

12 *Id.* at 427.

13 We identified 731 cases in 2014 and 877 cases in 2013. See National Taxpayer Advocate 2014 Annual Report to Congress 425; National Taxpayer Advocate 2013 Annual Report to Congress 324.

14 See National Taxpayer Advocate 2015 Annual Report to Congress 429.

15 See Taxpayer Bill of Rights (TBOR), www.TaxpayerAdvocate.irs.gov/taxpayer-rights. The rights contained in the TBOR that was adopted by the IRS are now listed in the Internal Revenue Code (IRC). See Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Division Q, Title IV, § 401(a) (2015) (codified at IRC § 7803(a)(3)).

16 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.

17 “*Pro se*” means “for oneself; on one’s own behalf; without a lawyer.” BLACK’S LAW DICTIONARY (10th ed. 2014). For purposes of this analysis, we considered the court’s decision 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.

AN OVERVIEW OF HOW TAX ISSUES ARE LITIGATED

Taxpayers can generally litigate a tax matter in four different types of courts:

- 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 the decisions of any of these courts.¹⁸

The Tax Court is a “prepayment” forum. In other words, taxpayers can access the Tax Court without having to pay the disputed tax in advance. The Tax Court has jurisdiction over a variety of issues, including deficiencies, certain declaratory judgment actions, appeals from CDP hearings, relief from joint and several liability, and determination of employment status.¹⁹

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,²⁰ and (2) the taxpayer has filed an administrative claim for refund.²¹ 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 trial.²² Bankruptcy courts can adjudicate tax matters that were not adjudicated prior to the initiation of a bankruptcy case.²³

18 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). See also *Byers v. Comm’r*, 740 F.3d 668 (D.C. 2014), cert. denied, 83 U.S.L.W. 3189 (U.S. Oct. 6, 2014) (No. 14-74) (the D.C. Circuit will not transfer cases to another circuit in non-liability CDP cases unless both parties stipulate to transfer the case).

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

20 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).

21 IRC § 7422(a).

22 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).

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

ANALYSIS OF PRO SE LITIGATION

As in previous years, many taxpayers appeared before the courts *pro se*. Figure 3.0.1 lists the Most Litigated Issues for the review period June 1, 2015, through May 31, 2016, and identifies the number of cases, categorized by issue, in which taxpayers appeared without representation. As the figure illustrates, the issues with the highest rates of *pro se* appearance are CDP and the frivolous issues penalty.

FIGURE 3.0.1, Pro Se Cases by Issue

Most Litigated Issue	Litigated Cases Reviewed	Pro Se Litigation	% of Cases Involving Pro Se Taxpayers
Accuracy-Related Penalty	122	70	57%
Collection Due Process	99	66	67%
Summons Enforcement	87	49	56%
Gross Income	81	49	60%
Trade or Business Expenses	73	45	62%
Failure to File, Failure to Pay, and Estimated Tax Penalties	45	28	62%
Civil Actions to Enforce Federal Tax Liens or to Subject Property to Payment of Tax	32	18	56%
Charitable Deductions	26	10	38%
Frivolous Issues Penalty (and analogous appellate-level sanctions)	23	22	96%
Trust Fund Recovery Penalty	21	6	29%
Total	609	363	60%

Figure 3.0.2 affirms our contention that taxpayers are more likely to prevail if they are represented. However, the disparity in the success rate between *pro se* and represented taxpayers decreased for the second consecutive year.²⁴ *Pro se* taxpayers prevailed in 17 percent of cases this year as compared to 19 percent last year, an 11 percent decrease in success rate. Notably, represented taxpayers fared worse than last year, achieving a 22 percent success rate as compared to 28 percent last year, a 21 percent decrease in success rate. Thus, for this year, the success rate for represented taxpayers was only five percent greater than that of *pro se* taxpayers.

FIGURE 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	70	22	31%	52	14	27%
Collection Due Process	66	8	12%	33	8	24%
Summons Enforcement	49	1	2%	38	7	18%
Gross Income	49	3	6%	32	5	16%
Trade or Business Expenses	45	15	33%	28	8	29%
Failure to File, Failure to Pay, and Estimated Tax Penalties	28	2	7%	17	3	18%
Civil Actions to Enforce Federal Tax Liens or to Subject Property to Payment of Tax	18	1	6%	14	1	7%
Charitable Deductions	10	3	30%	16	4	25%
Frivolous Issues Penalty (and analogous appellate-level sanctions)	22	6	27%	1	1	100%
Trust Fund Recovery Penalty	6	2	33%	15	2	13%
Total	363	63	17%	246	53	22%

24 See National Taxpayer Advocate 2015 Annual Report to Congress 430.