PRACTICE AND PROCEDURE

PRACTICE AND PROCEDURE STUDY HINTS

During the 2021 remote exam, Practice and Evidence were paired as the 2nd 110-minute segment of the exam. Most students did well with this information, and several expressed that they had extra time here that could have been used in the 1st segment (Federal Tax and Legal Ethics) if that segment hadn't been closed.

During the Tax Court Admission Examination for Non-Attorneys a copy of the Tax Court Rules of Practice & Procedure is provided for reference. With only one hour allotted to this section there is not enough time to look up every answer, and there are two schools of thought: memorize as much material as possible and use the resource to confirm information when needed or memorize the appropriate rule number and look up the answer when necessary, during the exam. Which approach makes the most sense to you? Decide ahead of time what will work for you, given the amount of time allocated to this section and your ability to retain the information.

Congress grants jurisdiction to the Tax Court (the Court). While this general grant of jurisdiction can be found in the Internal Revenue Code, the code sections are not found in any one area making jurisdiction the toughest topic to study in Practice and Procedure. Study prior exam questions and locate current answers as Tax Court jurisdiction changes over time. Jurisdiction questions are well suited to flashcards as are Tax Court Rules and related subjects.

Certain topics are bound to repeat each exam (subject matter jurisdiction questions or using a calendar to determine whether the appropriate filing periods or other date restrictions are met and elements of a petition, for example). While changes do occur in Practice and Procedure, they are not usually radical, so prior exam questions can be a good source of study material. They should not be your sole source of study materials – we know they test on their own cases, so it is important to stay current on them as well.

See the following samples of prior exam questions/answers that are commonly asked. For 2021 they asked "true or false" instead of asking for a "yes or no" answer – be sure to read the question so you answer it appropriately:

2021/P-1(a) 1 minute) TP receives a §6212 Notice of Deficiency and thereafter timely files with the Court a petition for redetermination of the proposed deficiency. Before the case is calendared for trial, TP pays to the IRS the amount of the proposed deficiency in the §6212 Notice of Deficiency. The payment by TP deprives the Court of jurisdiction with respect to TP's petition. True or False?

SUGGESTED ANSWER: False (2/2)

(b) (1 minute) The Court has jurisdiction to determine that TP overpaid income tax in the year properly before the Court based on a §6212 notice of deficiency determining a deficiency of income tax. True or False?

SUGGESTED ANSWER: True (2/2)

2018/P-5 (3 minutes) Discuss whether any delivery service other than the U.S. mail qualifies within the 7502(a) timely-mailing-is-timely-filing rule.

SUGGESTED ANSWER: An approved PDS may be used under §7502 if that particular service is on the list published by IRS. Stamps.com/similar mark or private postage meter can be used if the mark is not replaced by a USPS stamp and the item arrives within the appropriate timeframe for mail delivery to/from that location, or the TP can explain any delay in receipt. (6/6)

2018/P-6 (4 minutes) TP is physically present in the United States at all relevant times. On March 5, 2018, the IRS mailed to TP, to an address in the United States, a notice of deficiency (bearing the date of March 5, 2018) regarding TP's 2016 income tax liability. The notice of deficiency states that the last day on which a Tax Court may be filed is June 1, 2018. TP received it on March 7, 2018. What is the last day on which TP can file a petition with the Court? The following 2018 calendar may be of use to you:

	SUN	MON	TUES	WED	THURS	FRI	SAT
MARCH					1	2	3
	4	5	6	7	8	9	10
	11	12	13	14	15	16	17
	18	19	20	21	22	23	24
	25	26	27	28	29	30	31
APRIL	1	2	3	4	5	6	7
	8	9	10	11	12	13	14
	15	16	17	11	19	20	21
	22	23	24	18	26	27	28
	29	30					
MAY			1	2	3	4	5
	6	7	8	9	10	11	12
	13	14	15	16	17	18	19
	20	21	22	23	24	25	26
	27	28	29	30	31		
JUNE						1	2
	3	4	5	6	7	8	9
	10	11	12	13	14	15	16
	17	18	19	20	21	22	23
	24	25	26	27	28	29	30

Holidays in the District of Columbia during the months in the table are: (1) April 16 and (2) May 3.

SUGGESTED ANSWER: June 4, 2018 (8/8)

NOTE: Chief Counsel Method
Mar: 31-5=26
Apr: 30
May: 31

June: 3, but that is a Sunday, so move forward to June 4.

GRADING NOTE: June 4 received full points also, but any other answer received 0 points.

Be aware that this material is intended only for the purpose of assisting a student in studying for the Tax Court examination. It is not sufficient for practice before the Tax Court and once admitted, the new practitioner should search other sources for appropriate guidance.

NEW TO 2023

The Tax Court resumed in person proceedings, with members of the public required to register via QR code for entry (Administrative Order 2022-01). They sometimes hold hybrid trials, where witnesses are called via Zoom.gov.

You are responsible for knowing the Tax Court rules on the exam. The latest Tax Court Rules are effective 3/20/23. Although not all rules are substantive, there are 134 pages of notes; we've made every effort to include the final amendments in this text. Please let us know if you see anything that still needs to be addressed.
[https://ustaxcourt.gov/resources/rules/Notice_03202023.pdf]

INTRODUCTION TO THE U.S. TAX COURT

After the 16th Amendment to the Constitution added the income tax in 1913, it became apparent there needed to be a means to hear disputes between the Internal Revenue Service (IRS) and taxpayers. The Revenue Act of 1924 created the Board of Tax Appeals as a forum where taxpayers' disputes were heard before the disputed tax was paid. The Revenue Act of 1926 provided that the U.S. Courts of Appeal could review Board of Tax Appeals decisions. In 1942 the Board's name was changed to the Tax Court of the United States, but it remained an executive agency. In the Tax Reform Act of 1969 Internal Revenue Code (IRC) §7441 granted the Tax Court the status of a court under Article I of the U.S. Constitution, and changed the name to United States Tax Court.

The Court has limited jurisdiction, with only the power to adjudicate the controversies that Congress expressly and statutorily confers upon it. The Court cannot expand its jurisdiction on its own, but it does have the ability to determine whether or not it has jurisdiction over a matter. Jurisdiction is fundamental and must be addressed by the Court whenever a party raises the issue. If Tax Court lacks jurisdiction it cannot decide the issue even if all parties wish it could. Once the Tax Court has jurisdiction over the matter it retains jurisdiction, even if one or more parties wishes to be removed from its power.

The Court is granted its core authority in §6213 to redetermine a deficiency asserted by the IRS in income, gift or estate taxes. Jurisdiction generally depends upon:

- the IRS issuing a notice of deficiency (under §6212) with respect to tax deficiencies

under Subtitle A or B, or certain excise taxes under Chapters 41, 42, 43 or 44, **and**
- the taxpayer filing a timely petition.

Most employment and excise taxes are not subject to deficiency procedures. Since no notice of deficiency is issued, the taxpayer cannot petition the Tax Court.
Specific instances of Tax Court jurisdiction are covered at length in another section of this text.

COURT OFFICE
The principal office of the United States Tax Court is in Washington D.C., but the Court or any of its divisions may sit at any place within the United States under §7445 and §7701(a)(9). The mailing address is 400 Second Street, N.W., and Washington, D.C. 20217. Business hours are 8 a.m. to 4:30 p.m. except for Saturdays, Sundays, and legal holidays in the District of Columbia, which include the day set aside by statute for observation of:

New Year's Day (1/1)
Martin Luther King, Jr. (3rd Monday in January)
Inauguration Day (every 4th year)
Washington's Birthday (3rd Monday in February)
District of Columbia Emancipation Day (4/16)
Memorial Day (last Monday in May)
Juneteenth (6/19)
Independence Day (7/4)
Labor Day (1st Monday in September)
Indigenous Peoples' (2nd Monday in October)
Veterans Day (11/11)
Thanksgiving Day (4th Thursday in November)
Christmas Day (12/25)

A legal holiday also includes any day declared a holiday by the President or Congress, and any other day that the District of Columbia has declared a holiday, such as District of Columbia Emancipation Day – April 16.

PAYMENTS TO THE COURT (RULE 11)
The Tax Court accepts cash, check, money order or other draft made payable to the "Clerk, United States Tax Court." Some items may be paid by credit card or through Pay.gov. Specific fees and charges can be found on their website.

COURT RECORDS (RULE 12)
No original record, paper, document or exhibit filed with the Court can be taken from the Court (or custody of a judge or court employee) except as authorized by a judge. After the Court renders its decision in a case, a plain or certified copy of any paper (document, record, entry) pertaining to the case and still in the Court's custody may be obtained by application to the Court's Copywork Office and payment of the required fee.

TAX COURT JUDGES

The Tax Court headquarters are in Washington, D.C. The Court is composed of 19 presidentially appointed members. Currently (as of 1/8/23) there are 16 full-time judges, 10 senior judges, and 5 special trial judges who hear cases throughout the United States. Each Tax Court judge is appointed by the President, with the advice and consent of the Senate Finance Committee (not the Judiciary Committee) and serves a 15-year term. Once retired, a Tax Court judge may serve as a senior judge with all the force and effect of a Tax Court judge, when recalled by the Chief Judge under §7447(c). The service of a senior judge will not exceed 90 days per calendar year without the senior judge's consent.

Biannually the judges elect one judge to serve a two-year term as Chief Judge; Kathleen Kerrigan was elected to serve in this role for a two-year term beginning June 1, 2022. The Chief Judge is responsible for scheduling trials and other tasks. The Court sits at least annually in more than 70 cities to give taxpayers an opportunity to be heard with as little inconvenience and expense as possible.

SPECIAL TRIAL JUDGES

Under §7443A(a) the Chief Judge is permitted to appoint Special Trial Judges to hear Tax Court cases to deal with any matter pending before the Court, regardless of the level of complexity (*Freytag,* 501 U.S. 868 (1991)).

Under Rule 181 Special Trial Judges have the power to regulate all proceedings in any matter before them, including trials, pretrial conferences and hearings on motions. They can require the production of evidence and can put witnesses under oath and examine them. They can rule on the admissibility of evidence and may issue subpoenas and have other incidental authority as required for the conduct of trials and proceedings.

Under Rule 182 they can make decisions in any declaratory judgment proceeding, any small tax case (see discussion later in the text), any proceeding under §6320 or §6330 and in whistleblower actions. The Chief Judge may also authorize a Special Trial Judge to hear any other proceeding, but they cannot make a decision for the Court.

Special Trial Judges must file recommended findings of fact and conclusions of law, and a copy of those items are served on parties. Within 45 days, any party may file specific written objection. A party may respond to another party's objections within 30 days; those time periods may be extended by the Special Trial Judge. After the time for objections has passed, the Chief Judge must assign a case to a judge who may accept the Special Trial Judge's recommendations, direct the filing of additional briefs, receive further evidence, or direct oral argument. The judge is to consider that the Special Trial Judge is the one who heard the evidence and could evaluate credibility of the witnesses and the findings of the Special Trial Judge are presumed to be correct.

The Supreme Court reversed the Tax Court's decision in *Ballard (*321 F.3d 1037 (11th Circuit. 2003) and *Estate of Kanter* (337 F.3d 833 (7th Circuit 2003)) and held that the Tax Court may not exclude from the record on appeal the initial report of the Special Trial Judge submitted to the Chief Judge under Rule 183(b).

WHO APPEARS FOR THE GOVERNMENT

Attorneys from the Office of Chief Counsel of the Internal Revenue Service represent the government, also known as the respondent. Usually, these attorneys are employees of the local divisions of the Office of Chief Counsel and are known as Area or Associate Area Counsel. Except in routine cases, the Chief Counsel attorneys in Washington, D.C. review their briefs. Attorneys from the Tax Division of the Department of Justice or Assistant U.S. Attorneys typically represent the government in refund suits. These attorneys are more independent than Area Counsel, which may work in the taxpayer's favor.

WHO MAY APPEAR FOR THE TAXPAYER

Pro se Taxpayer or Represented by Counsel

The petitioner may appear pro se (self-represented), which indicates the taxpayer represents himself or herself. Authorized officers can represent corporate taxpayers and authorized members can represent unincorporated association taxpayers. An estate or trust can be represented by its fiduciary.

Rule 63 covers the substitution of parties once the petition is filed; for example, if a petitioner dies after the petition is filed, the petitioner's estate is substituted as petitioner.

Under Rule 60(a) and (c) when a petition is filed after a taxpayer is deceased, the petition must be filed by a fiduciary entitled to bring the case on behalf of the deceased taxpayer, otherwise the Tax Court has no jurisdiction. The daughter was not appointed a personal representative of the estate by a Florida probate court in *Sandra Sander, Deceased* (TC Memo 2022-103 (10/6/22)), and the daughter, who was sole trustee of a trust, had no authority to act for Sandra.

Individuals admitted to practice before the U.S. Tax Court can also represent taxpayers. To be admitted, an applicant must demonstrate to the Court's satisfaction that the applicant is of good moral character and repute and possesses the requisite qualifications (Rule 200).

Attorneys Admitted to Practice

An attorney at law must pay a $35 fee and produce a current certificate (executed within 90 calendar days) from the Clerk of the appropriate court showing the attorney is a member in good standing of the Bar of the Supreme Court of the United States or any state, commonwealth, territory or of the District of Columbia.

Non-Attorneys Admitted to Practice

A non-attorney must submit a completed application and fee and must pass a difficult written examination given by the Court. The Court must make a public announcement at least six months prior to the biannual examination date and announce the date and time. At this writing (4/8/23) we do not have the date/time or specific location (in person or remote) of the 2023 exam. We will advise you when this is available.

Each part must be passed with a score of 70% or better. No part may be carried forward, so the entire exam must be passed in one sitting.

Applicants for admission to practice before the Court must be sponsored by at least two persons who are admitted to practice. Each of the sponsors must send a letter of recommendation directly to the Court that meets the requirements specified in Rule 200(c). After passing the exam applicants must take and subscribe the oath or affirmation prescribed by the Court and pay a nominal fee to be admitted to practice.

EXAM ALERT!

It took nearly a year for those who took the 11/17/21 exam to be admitted to practice in late October 2022. In addition to receiving notification that they passed the exam in May 2022, obtaining their 2 sponsors, subscribing their oath and paying their fee, they had to wait for the Tax Court to review their video from the remote exam, then they had a "Moral and Professional Character Interview" via Zoom.gov over a four-week period.

It is not uncommon for bar candidates to be interviewed before their admission, but it was the first time this requirement was part of the nonattorney admission process. There was no prior notification of the requirement and it caught us by surprise.

There were a series of background questions asked of all candidates, including the application, personal background and test taking strategies. Background questions included whether you had issues with paying your bills, filing your taxes, paying your taxes, traffic tickets, drugs or alcohol offenses, whether you were named in any lawsuits and so forth. It was apparent they looked at social media pages and did a light internet search on the candidates. Other questions were specific to the candidate, including questions asked about the exam video. In several instances there were follow-up interviews, and in at least once instance, a portion of a video was replayed to ask the candidate what they were looking at during that part of the exam. Human review cleared other discrepancies noted during the video review.

Interviews were conducted by two attorneys and took approximately 15 minutes. Apparently, this requirement will continue into future years.

These questions were asked, according to one candidate:

1) Any convictions, arrests, or jail, any traffic tickets?
2) Any license actions in any industry?

3) Any bankruptcy?
4) Any legal actions against me?
5) Anything I want to add or them to know about me?
6) Test taking room environment and where taken?
7) How many computers/monitors?
8) Were they the same as now?
9) Did I take the USTCP exam before?
10) Suggestions for exam improvement?

Counsel not Recognized

If a representative signs a petition and is not admitted to practice, an order similar to this will be issued:

ORDER

The Petition filed to commence this case served on July 16, 2021, was not properly executed in that it did not bear the original signatures of petitioners or of a practitioner admitted and recognized to practice before the Tax Court, as required by the Tax Court Rules of Practice and Procedure. Rather, it appears that petitioners' non-attorney representative who is not admitted to practice before this Court signed the petition on their behalf. The United States Tax Court, which is separate and independent from the IRS, has certain requirements that must be met before an individual can be recognized as representing petitioners before the Court. The Court has prepared Q&A's on the subject "Representing a Taxpayer Before the U.S. Tax Court. A copy of these Q&A's are attached to this order. The Court also encourages practitioners and non-attorneys seeking admission to practice before the Court to consult "Guidance for Practitioners" on the Court's website at www.ustaxcourt.gov/practitioners.html. At this juncture, Kristina M. Lott will not be associated with this case and we encourage petitioners' representative to review the Court's admissions requirements.

Therefore, in order for this Court potentially to acquire jurisdiction to consider this case, it is necessary to obtain a Ratification of Petition bearing petitioners' original signatures and ratifying the petition previously filed. Upon due consideration and for cause, it is

ORDERED that, on or before September 10, 2021, petitioners shall file with the Court in paper form a Ratification of Petition ratifying and affirming the filing of the Petition on their behalf (preferably in "wet ink" signature, not a photocopied signature). Petitioners should note that the ratification of petition may not be electronically filed. It is further

ORDERED that the Clerk of the Court is directed to attach to this Order a form that petitioners may use to comply with this Order. It is further

Limited Entry of Appearance

Limited representation is permitted by Rule 1.2(c) of the Model Rules of Professional Conduct and Rule 201(a) of the Tax Court Rules. This allows attorney-client relationship even though by advance agreement of counsel and petitioner, the duties are limited in scope and duration is less than full representation.

Practitioners admitted to practice and in good standing with the Court may file a Limited Entry of Appearance (attached to the order and in the appendices here) during a scheduled Trial Session. A separate Limited Entry of Appearance is required for each case and must be:

1) Executed by the practitioner

2) Contain an executed acknowledgement by petitioner(s), and
3) Be served on all parties or their counsel.

The Limited Entry of Appearance Form may not be filed earlier than the start of a scheduled Trial Session and it will automatically terminate at the earlier of 1) the adjournment of the Trial Session, or 2) the end of the date(s) specified in the form. If the practitioner seeks to withdraw early, he or she must ask the Court for leave to withdraw.

This procedure took effect as of 9/9/19. Tax Court Administrative Order 2019-01 (5/10/19)

MEMORY TOOL – SLAPS
Limited entry of appearance elements

SLAPS
S – Separate appearance required for each case
L – Limited to date/time or activity
A – Admitted to the bar
P – Petitioner executed acknowledgment
S – Served on all parties

General Information – Counsel Admitted to Practice
Once admitted, the practitioner must promptly notify the Admission Clerk of any changes in office/mailing address. A periodic registration fee cannot exceed $30 per calendar year. The Clerk will maintain an Ineligible List that contains the names of all persons admitted to practice before the Court who failed to comply with these provisions.

Corporations and firms are not admitted to practice or recognized before the Court. Since only individuals may be admitted to practice, an individual must sign all Tax Court petitions and other pleadings. A corporate or association taxpayer's name is indicated by one of its active and authorized officers or members.

Example: Mary Doe, Inc. by Richard Roe, President.

The practitioner's name, address, and telephone number and counsel's Tax Court bar number must be typed or printed immediately below the written signature. The corporation's name may be included if it is an essential part of the accurate mailing address. The date of signature must be placed on all papers filed with the Court. Tax Court Rule 23(a)(2) and (3) governs signatures on Court pleadings.

PRECEDENT
Appeals of Tax Court decisions for corporate taxpayers are generally determined by reference to the corporation's principal place of business or principal office at the time the petition is filed.

Appeals for individual taxpayers are determined by the taxpayer's legal residence when the Tax Court petition is filed. An individual taxpayer residing in California, for example, will file an appeal in the 9th Circuit of the Court of Appeals. Under the *Golsen* rule (*Golsen*, 54 TC 742 (1970)), the Tax Court must "… follow a court of appeals decision which is squarely on point where appeal from our decision lies to that court of appeals." That trial is bound by decisions in the 9th Circuit, and must follow their rulings, even if they differ from other circuits.

The Golsen rule means the Tax Court looks to where the taxpayer resides when the petition is filed to determine which circuit court of appeal will hear any appeal; counsel must disclose relevant authority in that circuit, even if adverse.

Rule 3.3 of the ABA Model Rules of Professional Conduct requires that counsel notify the Court of all relevant adverse decisions in that circuit, so there is no hope that an adverse ruling will fall through the cracks and be ignored.

Can a taxpayer circuit-shop? Apparently so, because it is the taxpayer's legal residence at the time the petition is filed that governs which circuit would hear the appeal. Taxpayer and counsel must carefully consider whether such a tactic is worth its attendant cost.

It is not possible to judge-shop; when a petition is filed the taxpayer has no knowledge of which trial calendar the case will be assigned to, or which judge will be assigned to that calendar session. It is possible to time when a case will be heard by selecting a city where the Tax Court rarely visits.

COUNSEL

How Counsel Makes an Appearance

As indicated in Rule 24, counsel indicates an initial appearance by signing the petition. If the taxpayer originally filed the petition pro se, counsel indicates his or her appearance by filing an entry of appearance in duplicate (see Forms at ustaxcourt.gov). Counsel must sign the entry form and must include a statement that she or he is admitted to practice before the Court.

If other counsel was retained and is replaced, counsel makes an appearance by filing a substitution of counsel. This form must indicate that opposing counsel was given prior notice of the substitution and that there is no objection. Substitution is not permitted for any case calendared for trial or hearing.
Form 8 is Substitution of Counsel [https://ustaxcourt.gov/resources/forms/SOC_Form_8.pdf]

Law students may assist counsel (with permission of the presiding judge and under the direct supervision of counsel) at a hearing or trial or in drafting a pleading. Law students may not enter an appearance or be recognized as counsel.

Counsel may file a limited entry of appearance as permitted by the Court under Administrative Order 2020-03. The Court, may in its discretion, temporarily recognize an individual as the party's representative and no entry of appearance is necessary.
[https://www.ustaxcourt.gov/forms/Limited_Entry_of_Appearance.pdf]

WITHDRAWAL OF COUNSEL
Also as noted in Rule 24, counsel of record wishing to withdraw must file a motion with the Court and request its leave for the withdrawal. The notice of withdrawal is filed no later than 30 days before the first day of the Court's session at which the case is calendared for trial. Opposing counsel must be notified before the motion is filed, and a statement as to any objection must be included. The Court may deny this motion at its discretion.

There are times when counsel must withdraw from representation, including when a conflict of interest exists. A conflict is present if counsel:

- was involved in planning or promoting a transaction or operated an entity that is connected with any issue in a case,
- represents more than one person with differing interests with respect to any issue in a case, **or**
- is a potential witness in a case.

For the first two situations counsel can either secure the informed consent of all parties, withdraw, or take steps to obviate the conflict of interest. If the third situation exists, counsel has no choice but to withdraw as this conflict cannot be waived.

Tax Court Rules also permit counsel to withdraw in the event of death, or if there is a change in party or authorized representative (such as a corporate officer or a change in fiduciary).

The ABA Model Rules of Professional Conduct permit counsel to withdraw if the client:

- breaks a promise to attorney (refuses to pay fees, for example),
- becomes a financial burden on attorney, **or**
- is uncooperative.

Note, however, the Tax Court judge can accept or deny any motion a practitioner makes to withdraw from a case, particularly once the case is calendared for trial. A wise practitioner will advise the Court as soon as possible if a problem exists but must be aware that the Court may not allow a desired withdrawal to occur.

MEMORY TOOL – PCW
Withdrawal of counsel required by Tax Court rules:

P – Plan/promote transaction – informed consent waives
C – Conflict of interest – informed consent waives
W- Witness – conflict cannot be waived by informed consent

EXAM ALERT!
Note that "no later than 30 days before the first day of the Court's session" for counsel withdrawal is effective as of 10/6/20.

EFFECT OF COUNSEL'S SIGNATURE – RULE 33
Every pleading must be signed. Rule 33 contains the language of the Federal Rules of Civil Procedure Rule 11, and specifies that when counsel signs any pleading, she or he certifies they:

- read the pleadings,
- believe after reasonable inquiry and to the best of his or her information, knowledge and belief that it is well grounded in fact and is warranted by existing law, or is a good faith argument for the extension, modification, or reversal of existing law,
- believe the pleading is not done for any improper purposes such as to harass or cause unnecessary delay or needless increase in the cost of litigation, **and**
- are authorized as counsel to represent the party or parties on whose behalf the pleading is filed.

Any unsigned pleading is stricken, unless it is promptly signed after counsel is made aware of the omission.

Counsel may not knowingly sign anything false. If the pleading is signed in violation of Rule 33, the Court can impose any sanction it deems appropriate. This can include an order to pay the opposing party the amount of reasonable expenses incurred because of the pleading, including counsel's fees. Sanctions can also call for a disciplinary hearing or suspension and/or disbarment under Rule 202.

Counsel may not knowingly sign anything false.
Counsel cannot allow a witness to testify falsely.
Counsel's signature on any pleading certifies counsel has read the pleading, believes it, there is no improper purpose for the pleading, and that they are authorized to represent the party.

MEMORY TOOL – RIBA
Certifications of counsel's signature:

R – **Read** the pleading
I – No **improper** purpose
B – **Belief** it is well grounded
A – **Authorized** to represent

SUSPENSION/DISBARMENT OF COUNSEL (RULE 202)

A member of the Tax Court bar may be disciplined by the Court as a result of:

- conviction in any court of the United States of any felony or of any lesser crime involving false swearing, misrepresentation, fraud, criminal violation of any provision of the Internal Revenue Code (IRC), bribery, extortion, misappropriation, theft, or moral turpitude;
- imposition of discipline by any other court of whose bar an attorney is a member, or an attorney's disbarment or suspension by consent or resignation from the bar while an investigation of misconduct is pending,
- conduct with respect to the court which violates the letter and spirit of the ABA Model Rules of Professional Conduct, the Rules of the Court, or orders or other instructions of the court, **or**
- any other conduct unbecoming a member of the Bar of the Court.

Counsel may be disciplined by disbarment, suspension from practice before the Court, reprimand, admonition, or any other sanction the Court may deem appropriate. The Court may immediately suspend a practitioner until further order of the Court, but no person may be suspended more than 60 days without a hearing. A Tax Court judge may also immediately suspend any person for not more than 60 days for contempt or misconduct during the course of any trial or hearing.

If counsel is suspended 60 days or less, automatic reinstatement follows the end of that time period. If counsel is suspended more than 60 days, a court order is required for reinstatement. If the disciplinary proceeding was required by a judge of the Tax Court, a panel of three other Tax Court judges appointed by the Chief Judge hears the matter. A suspended practitioner must demonstrate by clear and convincing evidence that the practitioner's reinstatement will not be detrimental to the integrity and statement of the Court's bar or to the administration of justice, or subversive of the public interest.

No petition for reinstatement under this rule can be filed within one year following an adverse decision upon a petition for reinstatement.

Practitioners have the right to counsel at all proceedings conducted under this rule. The Court may appoint counsel to the Court to assist it with respect to any disciplinary matters.

OVERVIEW OF TAX CONTROVERSY PROCESS

The IRS may select a taxpayer's income tax return for review at any time during the statute of limitations period, generally within three years of the date the tax return is due or filed. The IRS will frequently request the taxpayer extend the statute of limitations for at least one of the years under audit. The taxpayer must be advised that they have the right to refuse to grant an extension, or to limit any extension. The agent will often request an extension of at least 9 to 12 months following the expected audit completion date to permit the case to be processed.

Form 872, *Consent to Extend the Time to Assess Tax*, is the standard consent form to extend the statute of limitations to a specific date. A modified Form 872 can limit the extended period to specific issues or items from a specific investment or related entity.

Form 872-A, *Special Consent to Extend the Time to Assess Tax*, extends the period of limitations indefinitely. It is an open-ended consent, which extends the limitations period until terminated plus 90 days for closing. It can be terminated only:

- if the taxpayer provides written 90-day notice on Form 872-T that the extension will terminate,
- the IRS provides a written 90-day notice on Form 872-T that the extension will terminate, **or**
- the IRS issues a notice of deficiency for the period in Form 872-A.

To be valid, the consent must be executed within the statute of limitations (*Carpenter Family Investments, LLC* (136 TC 17 (12/19/11)). The extension must be terminated or it remains valid and there is no other action the taxpayer can take to terminate the extension. In *Greenfield* (TC Memo 2008-16 (1/31/08)) the petitioner signed Form 872-A in 1986. Form 872-A is not an executory contract – it is a unilateral waiver of the original 3-year limitations period. Until terminated it extends the statute for both the income tax deficiency and the increased rate of interest. The extension may not be terminated by writing a letter, or by the passage of a 'reasonable' time after signing the form (*St. John v United States*, 951 F.2d 232 (9th Cir. 1991)). It can only be terminated as discussed above. If the 872-A is executed for multiple periods but the notice of deficiency is only issued for some of the periods, it does not terminate the extension for periods not mentioned.

If the parties do not agree in examination, the IRS may issue a Preliminary Notice, also known as the 30-day letter, of the proposed deficiency. If the taxpayer files a protest in response to the 30-day letter, the case goes to the IRS Independent Office of Appeals (Appeals).

If the amount of tax remains in dispute after Appeals, or if the taxpayer fails to respond or the 30-day period expires, or if the IRS does not issue a Preliminary Notice, the IRS issues a notice of deficiency. Also called the 90-day letter, or the "stat" notice, this notice gives the taxpayer 90 days (150 days under certain circumstances, discussed later) in which to file a petition for a redetermination of the proposed deficiency with the Tax Court. There are no extensions of time to file for a deficiency case; if the taxpayer files an untimely petition, the Tax Court does not have jurisdiction to hear the case.

During the relevant petition period (90/150 days as discussed later) and unless the taxpayer waives the restrictions on assessment or collection after the date the statutory notice is mailed, no assessment or collection of a deficiency can be made on these taxes (although math errors may be corrected). If a petition is filed in the appropriate time period the deficiency cannot be assessed or collected until the Court renders its final decision. If no petition is filed a notice and demand for payment for the amount is mailed to the taxpayer when the 90/150 days expires.

If the taxpayer makes a payment on a deficiency before a petition is filed, the amount of that payment is assessed, effectively removing jurisdiction from the Tax Court. A cash deposit on the account can be made to stop the running of interest without depriving Tax Court of jurisdiction (under §6603(a); Rev. Proc 2005-18, 2005-13 I.R.B. 798, Rev Proc 84-58). Full payment of an asserted deficiency can also be made after the statutory notice is issued without losing Tax Court jurisdiction but remember in the petition to plead the request of an overpayment refund should the taxpayer prevail.

Taxpayers can choose to have their disputes heard in the district court, the United States Claims Court or Bankruptcy Court, or in the United States Tax Court. There are several advantages to using the Tax Court:

- the taxpayer does not have to prepay the amount of tax in controversy (but remember interest continues to accrue on the underlying deficiency while the matter is under Court jurisdiction or on appeal);
- no trial by jury is permitted;
- Tax Court judges are experts in tax law;
- discovery is restricted in Tax Court. In general, the proceedings are less formal and less expensive than those in other court venues;
- unless referred to the Tax Court by Appeals (see note below) all cases docketed to the Tax Court are subject to review by the IRS Appeals Division, so filing a petition generally offers another opportunity to settle the tax controversy with the IRS; **and**
- small tax cases involving less than $50,000 in income, gift, or estate tax (and other jurisdictional situations) can be heard in a setting less formal than regular cases.

Under Rule 13 a timely filed petition is also required to grant jurisdiction to the Tax Court in all other cases (joint and several liability, declaratory judgments, disclosure, lien/levy actions, redetermination of employment status, abatement of interest, etc.) as indicated in the Tax Court Rules.

These elements are required to grant jurisdiction for deficiency cases:
the IRS issues a timely notice of deficiency to the taxpayer's last known address,
and the taxpayer files a timely petition, usually within 90 days.

Tax Court jurisdiction is also dependent upon the proper party filing the petition. Capacity to sue within the court depends upon state law. If a corporation loses its charter or franchise under state law any petition brought by the corporation will be dismissed for lack of jurisdiction in *Vahlo Corp* (97 TC 428 (1991)). In a more recent case, the California Franchise Tax Board suspended petitioner's corporate powers, rights and privileges on 12/1/20; on 3/2/21 the IRS issues a final adverse determination letter in a declaratory judgment case. Even though the petition was timely, the case was dismissed because petitioner lacked legal capacity to initiate the case when filed and for the entire 90-day period during which the petition was required to

be filed in (*XC Foundation*, TC Memo 2023-3 (1/5/23). The petitioner tried to argue that their executed Form 872 preserved its right to petition the Tax Court, but those appeal rights are administrative, within the IRS, and not the taxpayer's ability to secure judicial review.
Tax Court is a court of limited jurisdiction without power unless Congress expressly confers power to the Court. While it has the jurisdiction to determine whether it has jurisdiction, it cannot confer jurisdiction where none exists, even if all parties wish it to hear a case. Tax Court under IRC §6213 has the authority to redetermine a deficiency on matters including income tax (Subtitle A), estate and gift tax (Subtitle B) and excise tax (Chapters 41, 42, 43, and 44).

The 'rules of engagement' for IRS counsel and appeals are found in Rev Proc 87-24. Docketed cases are referred by IRS counsel cases to Appeals for consideration of a settlement, unless Appeals issued the deficiency. In that case it is only referred back to Appeals if it appears a case can be settled in a reasonable amount of time. Appeals generally has exclusive settlement jurisdiction for a period of 6 months after the case is received from IRS counsel (subject to issuance of a trial calendar for a regular case, or 15 days before calendar call in S cases). If the taxpayer and IRS agree on a settlement, they can enter into a written agreement stipulating the amount of the deficiency or overpayment. The stipulation is filed with the Tax Court, which enters a decision consistent with the parties' agreement.

Once IRS counsel is satisfied that a case is fully developed factually and legally, and IRS counsel is able to evaluate the IRS's litigating posture, counsel determines whether a settlement offer or negotiations will be entertained. IRS counsel is not bound by prior settlement proposals or discussions.

As occurs within Appeals, a higher percentage of Tax Court cases are settled rather than tried.

Tax Court and U.S. District Court decisions can be appealed to the U.S. Courts of Appeal. At its discretion, the U.S. Supreme Court may hear appeals from the U.S. court of appeals; often when they hear a tax case it is because the various circuits treat a tax issue inconsistently.

Generally, the IRS can subject a taxpayer's return for any given year to only one audit. Under §6212(c), the IRS can re-audit a taxpayer's records if it suspects that a fraud has been committed or to correct mathematical errors. However, be aware that in one Tax Court case (*Kelley* TC Summary 2005-68) the IRS was permitted to change the taxpayer's treatment of an income item even though she had been through 3 previous audits where the item was examined and not corrected. The Court determined that the IRS has the opportunity to correct an item that was misreported. Note that this is a Summary case, which means it cannot be cited or used as precedent, but it does address the IRS's ability to correct prior mistakes.

Under §6214(a) the IRS is allowed to assert greater deficiencies than on a notice of deficiency once the matter is before the Tax Court.

NOTICE OF DEFICIENCY

In order for the Tax Court to have jurisdiction in a deficiency proceeding, the IRS must first determine a deficiency exists. Generally, the Tax Court will not look beyond the notice of deficiency to determine that it is properly issued (*Greenberg's Express, Inc.* 62 TC 324 (1974). That said, the IRS must examine the tax return in question and cannot simply assume taxpayers improperly reported income to protect the government's interest, as it attempted in *Scar* (814 F.2d 1363 (9th Cir. 1987)).

Timothy Dees (148 TC 1 (2/2/17)) claimed a refundable credit on his 2014 return. Respondent determined he was not entitled to the refundable credit and issued a notice of deficiency that showed a deficiency of $0.00 on the first page. The Commissioner offered testimony that there was a clerical error in the notices of deficiency issued by the Atlanta campus disallowing the relevant premium tax credit and incorrectly reflecting a deficiency in tax of $0.00 on the first page of the notice. A clerical error should not invalidate the notice.

The Tax Court will not look beyond the notice of deficiency to determine if it is properly issued. Further, the notice of deficiency is valid even if it does not state the last day for filing the petition.

There is no requirement that the IRS send a 30-day letter before issuing a notice of deficiency *Caldwell* (136 TC 2 (1/31/11)). If the IRS issues an invalid notice, it may issue a new notice as long as the statute of limitations is open (*Pace Oil*, 73 TC 249 (1979)). Absent fraud or other special circumstances, if the taxpayer files a petition using a valid notice of deficiency the Commissioner may not issue a second notice for the same taxes, same year under Reg. §301.6212-1(c).

DEFICIENCY

A deficiency is the amount by which the correct amount of tax determined by the IRS exceeds the total of the amount of tax shown by the taxpayer on the return plus rebates. Historically most cases going before the Court relate to deficiencies but since the IRS Reform and Restructuring Act of 1998, about half the cases coming to the Tax Court now relate to collection activities.

A deficiency is the amount by which the correct amount of tax determined by the IRS exceeds the amount of tax shown on the taxpayer's tax return. Tax Court has jurisdiction if a timely petition is filed.

It is critical a taxpayer not eliminate a deficiency before a notice of deficiency is issued; without a deficiency, there is no Tax Court jurisdiction. Taxpayers can pay the deficiency after the notice is issued under §6213(b)(4), which stops the accumulation of applicable interest and/or penalties. If the payment results in an overpayment of taxes the Tax Court is required to state the amount of the overpayment when making its decision (but put the possible refund in the petition as part of the prayer for relief).

Issuing a refund for a year does not preclude the Commissioner from issuing a valid notice of deficiency. In *Gary Krantz* (TC Memo 2018-17 (2/14/18)) petitioner filed his 2014 return without claiming the standard deduction. IRS issued a refund based on a math adjustment, but later indicated that he also omitted nearly $10,000 in wages, cancellation of indebtedness income, and a taxable HSA distribution. Petitioner first tried to argue that respondent's concessions in the CP2000 rendered the notice of deficiency invalid because they were made after the notice of deficiency was issued, but respondent's concession does not destroy presumption of correctly of the notice of deficiency as to the remaining issues. A refund is not binding on the Commissioner in the absence of a closing agreement, valid compromise or final adjudication

NOTICE REQUIREMENTS

To determine if the notice is valid the Court applies a two-prong test. First the Court determines whether the purported notice, on an objective basis, would inform a reasonable taxpayer that the Commissioner had determined a deficiency as to that taxpayer. If the notice does so unequivocally, the inquiry ends there as the notice is valid. If the notice is ambiguous, the party seeking to invoke jurisdiction must establish both 1) the Commissioner made a determination as to the taxpayer and 2) the taxpayer was not misled by the ambiguous notice. Failure to meet either test results in a conclusion that the notice is invalid.

The IRS is not obligated to explain how deficiencies are determined or to lay out the factual basis for its determination of the deficiency (*Caldwell* (136 TC 2 (1/31/11)). The notice of deficiency must be sufficient to allow the petitioner to comply with the petition rules (for clear/concise assignments of every error), which is not a high bar.

There is no required format for a notice of deficiency and not all demands for money permit a taxpayer to file a petition to the Court. The notice must identify that it is a 'notice of deficiency,' must indicate an amount of tax due, and must identify the taxable period. The notice need not be signed to be valid (while the Internal Revenue Manual (IRM) indicates it should, the IRC does not).

A notice of deficiency that indicates a calculation of tax for several years, but only seeks a deficiency for one year only confers Tax Court jurisdiction to the year stated. The Court has no jurisdiction if the notice refers to a fiscal year and the entity keeps its books on a calendar year (*Century Data Systems, Inc (*80 TC 529 (1983)). If the notice refers to a longer period (because the tax year was cut short by a corporate liquidation or death of a taxpayer) it is still valid

(*Sanderling* 571 F.2d 174, 176 (3d Cir. 1978) and *Yaeger Est v Comm'r,* 801 F.2d 96 (2d Cir. 1989)).

The notice must identify the proper party. In *US Auto Sales, Inc* (153 TC 4 (10/28/19) respondent issued a notice of deficiency in May 2012 that identified petitioner as the taxpayer in the first 4 pages, but in the last 7 pages of the 11 page notice a separate, related corporation was identified as the taxpayer. The Court found that the notice didn't relate to petitioner. The Tax Court will not look beyond the notice of deficiency, even at petitioner's request. In *Maria Ivon Moya* (152 TC 11 (4/17/19)) petitioner challenged respondent's determinations on the grounds that her rights were violated during the examination (the Las Vegas office continued to work her file even though she had moved to California). She felt she was denied the right to have her questions answered and the right to meet with an IRS representative at a time and place convenient to her. A trial before the Court is a de novo proceeding, and the Court's determination about the petitioner's tax liability is based on the merits of the case.

ASSESSMENT

An assessment refers to the amount that can be collected by the IRS through administrative means without any court action. No Tax Court jurisdiction is granted to assessments, including those arising from mathematical or clerical errors. If the IRS corrects an overstated withholding or estimated payment credit as if it is a math error, there is no Tax Court jurisdiction.

IRS FORM 870-AD

If the taxpayer executes Form 870-AD (*Offer of Waiver of Restrictions on Assessment and Collection of Deficiency in Tax and of Acceptance of Overassessment*), the IRS is not required to issue a notice of deficiency before assessing the tax. Without a notice of deficiency, the taxpayer has no 'ticket' to Tax Court (*Cross v U.S.*, 96-1 USTC ¶50,125 (D. Kansas, 1995)).

In *Estate of Bonnie Deese* (TC Memo 2007-362 (12/10/07)) the decedent and his wife signed Form 870-AD less than 3 months before he died. His widow contended she should not be liable for the underlying tax liabilities; the Court found that by signing Form 870-AD both taxpayers waived their right to a notice of deficiency and gave up any right to challenge the underlying liabilities in a collection hearing.

STATUTE OF LIMITATIONS

Statute of Limitations – 3 years

The notice of deficiency must be mailed prior to the expiration for the assessment statute of limitations (ASOL). The notice is valid if it is mailed before that time, even if it is not received by the taxpayer until after that date passes in *Scheidt* (967 F.2d 1448 (10th Cir 1992)).

Generally, the ASOL for an income tax return that is timely, completely, and nonfraudulently filed is 3 years from the date the tax return was filed. If filed on or before the original due date, the deemed filing date is the deadline. If filed after the original due date, the filing date is the date it is received unless it is timely filed pursuant to an extension under §7502.

Examples of the Assessment Statute of Limitations – 3 years
If taxpayer timely files the return the mailing date determines if §7502 provisions apply. Here we assume the actual filing date as announced, not with the bonus 'add-on' date we experienced:

Tax Deadline	Mailing Date	Received by the IRS	Statute Date
4/18/22	2/14/22	2/18/22	4/15/25 (Rev Rul 81-269)
4/18/22	4/14/22	4/21/22	4/15/25 (§7502)

If the taxpayer timely files an automatic extension of time:

Tax Deadline	Mailing Date	Received by the IRS	Statute Date
10/17/22 (Mon)	7/12/22	7/15/22	7/15/25
10/17/22 (Mon)	10/11/22	10/14/22	10/14/25
10/17/22 (Mon)	10/15/22	10/26/22	10/15/25 (§7502)

Statute of Limitations – 6 years
The statute of limitations extends to six years on any return where there is an understatement or omission of income that exceeds 25%. This amount is calculated as the amount of omitted income divided by the original gross income reported on the return.

Examples of the Statute of Limitations – 6 years

	Amount as reported	Corrected	Change
Schedule C (gross)	$150,000	$ 175,000	$ 25,000
Schedule C (net)	45,000	75,000	
Interest	1,500	15,000	13,500
Dividends	2,500	3,500	1,000
Deductions/Exemptions	(20,000)	(15,500)	
Taxable Income	$29,000	$ 78,000	

Amount of gross income change = $39,500 ($25,000 + 13,500 + 1,000)
Amount of original gross income = $154,000 ($150,000 + $1,500 + $2,500)
Percentage understated/omitted = 26% ($39,500/$154,000)

The statute of limitations on this return extends from 3 years to 6 because the amount of the gross income omitted or understated exceeds 25%. Remember, the issue is GROSS income, not what is reported on the net Schedule C.

Another example:

	Amount as reported	Corrected	Change
Schedule C (gross)	$150,000	$173,000	$ 23,000
Schedule C (net)	45,000	68,000	
Interest	1,500	15,000	13,500
Dividends	2,500	3,500	1,000
Deductions/Exemptions	(20,000)	(15,500)	
Taxable Income	$ 29,000	$ 71,000	

Amount of gross income change = $ 37,500 ($23,000 + 13,500 + 1,000)
Amount of original gross income = $154,000 ($150,000 + $1,500 + $2,500)

Percentage understated/omitted = 24.3% ($37,500/$154,000)

The statute of limitations on this return remains 3 years because the amount of the gross income omitted or understated was less than 25%.

Effective 7/31/15, the 6-year statute of limitations includes when the failure to report the income is the result of an overstatement of basis in property that was sold. The new law clarifies that overstating basis, resulting in a reduced gain upon the sale of the property, is the same as omitting gross income from a tax return. Prior to the new law, the Supreme Court ruled in *Home Concrete* that the 6-year statute did not apply if the omitted income was a result of overstating the basis of property. Remember that the only way to overcome a Supreme Court ruling is for Congress to act, which it did in this instance by changing the law so the 6-year statute includes this instance.

No Statute of Limitations

The statute of limitations does not begin to run until a tax return is filed. While the IRC does not define the term "return" the Tax Court previously established a four-part test in *Beard* (82 TC 766 (1984)). To qualify as a return the document must:

- contain sufficient data to calculate tax liability,
- purport to be a return,
- be an honest and reasonable attempt to satisfy the tax law, **and**
- be executed under penalty of perjury.

The normal assessment statute of limitations (ASOL) is 3 years for a timely, nonfraudulent return. The ASOL becomes 6 years if there is a gross income omission of 25% or more, or if there is an overstatement of basis. No ASOL applies if a return is not filed, or if a fraudulent return is filed, regardless of whether the fraud was committed by the taxpayer or the tax return preparer.

If a fraudulent tax return is filed, the statute of limitations does not run even when a later, correct income tax return is filed. It does not matter whether the fraudulent intent is committed by the taxpayer or by the taxpayer's preparer. In *Allen* (128 TC 4 (3/5/07)) the petitioner's tax preparer claimed false and fraudulent Schedule A itemized deductions. The preparer was indicted, tried, and convicted of willfully aiding and assisting in the preparation of false and fraudulent returns. The statute has no express requirement that the fraud be the taxpayer's. The statute of limitations is strictly construed in favor of the government – taxpayers have an obligation to review their returns for items that are obviously false or incorrect.

> Example: Petitioner failed to file his 1996 tax return in *John Hobart Zentmyer* (TC Memo 2017-197 (10/4/17)). He served time in prison for tax evasion and financial crimes and the IRS prepared a substitute for return. The IRS issued a notice of deficiency on 12/12/16, and the petition was filed 3/8/17. The judge wrote, "One can only speculate about whether there might have been a worker bee in a particular federal office who led to this adjustment suddenly popping up after a period of more than 20 years had elapsed, but this revelation is of no consequence because Petitioner's instant challenge shifts the burden of proof to Respondent such that the Notice is void unless Respondent can validate the purported deficiency." The petitioner's arguments were found frivolous, and the notice was deemed valid.

§7502 TIMELY MAILED/TIMELY FILED RULE

The "timely-mailing-is-timely-filing" rules of §7502 and its regulations under §301.7502 apply to tax returns filed with the IRS as well as petitions filed with the Tax Court. Under §7502 if any return, claim, statement, or other document required to be filed, or any payment required to be made, is delivered by US mail to the agency, officer, or office where such item is required to be filed or paid, the date of the United States postmark stamped on the cover is deemed to be the date of delivery or the date of payment. The item must be deposited in the US mail in an envelope or appropriate wrapper, properly addressed, with correct postage affixed.

If the mail is not postmarked the taxpayer may still be able to provide proof of mailing. In *Blake* (TC Memo 2007-184 (7/12/07)) the petitioner's representative sent a petition to the Tax Court along with a $60 check. The envelope bore 4 first class stamps that were not cancelled and it did not have a U.S. postmark. The envelope was received outside the 90 days and bore no obvious signs it was subjected to the irradiation treatment that occurred after 9/11/01. Since the envelope bore no postmark, the taxpayer was able to offer extrinsic evidence to establish date of mailing of the envelope. Here the representative testified about his steps to mail the envelope on the last date specified.

Since the Taxpayer Bill of Rights 2 (TBOR 2) was enacted, taxpayers can use designated commercial or private delivery services (PDS) and take advantage of the timely mailed/timely filed rule. Only approved carriers and particular services are sufficient for §7502 provisions. The IRS updates the available services periodically when there are changes and no longer issues

an annual list. Providers include certain services of DHL, Federal Express (FedEx) and United Parcel Service.

Taxpayers must be certain that the designated private delivery service actually is given or picks up the document on or before its due date. Electronically recorded mail dates (DHL or UPS) are treated as the postmark for §7502. FedEx generates a label that is applied to the cover; if that label is generated and applied by a FedEx employee, that date applies even if the customer uses a different date. If the label is generated and applied by the FedEx customer (taxpayer), the date is used as long as delivery is received within the normal delivery time for that service. If it is not received in that time frame, the taxpayer must show the item was actually given to a FedEx employee on or before the due date and why the delivery delay occurred.

> Example: In *Austin* (TC Memo 2007-11 (1/16/07)) the petitioner handwrote the airbill using 5/8/06 date; she was out of town and had been assured by the hotel that FedEx would pick up the package that date. The electronically generated label showed 5/9/06 as the date. The IRS challenged her petition; the Court ruled that giving her petition to the hotel clerk was insufficient and her petition was dismissed as untimely.

The timely mailed/timely filed rules do not apply in the same way with private postal meters. If an envelope arrives after the time customary for an envelope mailed on the last date required, or the US Postal Service stamps the envelope with a date later than the private postal meter, the private meter date is disregarded. The taxpayer must then use other evidence to establish proof of mailing including that the delay was attributable to a mail transmission delay and the reason for the delay. In *Grossman* (TC Memo 2005-164 (7/5/2005)) the taxpayer was able to establish the privately postmarked mail was timely filed, but that the late delivery was due to a US Postal Service delay.

Stamps.com postage label is "the modern equivalent of the output of an old-fashioned postage meter" in *Pearson* (149 TC 20 (11/29/17)). The regulations §301.7502-1(c) uses the terms "postmark made by the US Postal Service" and "postmark *** not made by the US Postal Service" without defining either term or furnishing examples of postmarks not made by the USPS. The Court agreed that the stamps.com postage label indicates the date on which the consumer purchased the postage and electronically generated the label.

Sending petitions by a designated PDS or using Certified, Return Receipt Requested services available through the US Postal Service (USPS) allows the taxpayer to defend an IRS motion for dismissal for lack of jurisdiction. The date-marked receipts offer the appropriate proof of mailing. Remember, a petition filed after the 90th day is invalid, regardless of what caused the delay.

As announced in Revenue Ruling 2002-23 the IRS now accepts as timely filed any federal tax return, claim for refund, statement or other document that is mailed from and officially postmarked in a foreign country on or before the last date prescribed for filing. Similarly, the

IRS will accept as timely filed any of those items that are given to a designated international delivery service before midnight on the last date prescribed for filing. A foreign **postmarked** item must still be **received at the Tax Court** on or before the last date prescribed for filing.

Timely mailing rules under §7502 are met using USPS (certified return receipt mailing is best), or an approved private delivery service (PDS). Stamps.com or similar postage labels also count as long as the item is received within the normal period for delivery, and the USPS did not affix a new date (follows private postage meter rules).

EXAM ALERT!

You do not need to memorize this list but understand that unless the service is on the list it isn't approved for §7502. On the exam indicate "approved PDS that meet §7502 requirements."

As of 1/9/23, this is the list of designated PDS per irs.gov:

DHL EXPRESS:

1. DHL Express 9:00
2. DHL Express 10:30
3. DHL Express 12:00
4. DHL Express Worldwide
5. DHL Express Envelope
6. DHL Import Express 10:30
7. DHL Import Express 12:00
8. DHL Import Express Worldwide

FEDEX:

1. FedEx First Overnight
2. FedEx Priority Overnight
3. FedEx Standard Overnight
4. FedEx 2 Day
5. FedEx International Next Flight Out
6. FedEx International Priority
7. FedEx International First
8. FedEx International Economy

UPS:

1. UPS Next Day Air Early A.M.
2. UPS Next Day Air
3. UPS Next Day Air Saver
4. UPS 2nd Day Air
5. UPS 2nd Day Air A.M.
6. UPS Worldwide Express Plus
7. UPS Worldwide Express

MEMORY TOOL – PADE
§7502 requirements are deemed met:

P – proper **postage**
A – properly **addressed**
D – deposited on last **date** for filing
E – proper **envelope** or wrapper

NOTICE MAILING REQUIREMENTS
The IRS issues a valid notice of deficiency under §6212(a) when it sends the notice of deficiency to the taxpayer by certified or registered mail; mailings within the United States are sent certified and those outside the United States are sent registered. The mail receipt stamped by the USPS establishes the date of mailing. The date on the notice is not controlling, although it may be the same day as the receipt is stamped. Mailing it to the taxpayer's last known address is deemed 'sufficient' under §6212(b).

What if the taxpayer does not get the notice of deficiency? If the IRS used taxpayer's last known address, the notice is valid, even if never received. The notice is valid even if the US Postal Service returns an undelivered notice of deficiency to the IRS, as long as the last known address was used.

The notice of deficiency is valid if mailed to taxpayer's last known address, even if the taxpayer didn't receive it.
The notice is valid even if mailed to the wrong address, if the taxpayer receives it "in time."
30 days is deemed adequate time to file a petition.

Physical receipt of the notice of deficiency is deemed to constitute actual notice. Even if the notice is not mailed to the last known address or uses an incorrect address, it is valid if the taxpayer receives the notice in time to file a petition. Even if the deficiency notice is forwarded several times is not relevant if the taxpayer is not prejudiced by the delay (*McMahon*, 72 TC Memo (CCH) 1348 (1996)).

How many days are considered to be 'in time'? Seventeen days was insufficient in *Looper* (73 TC 690 (1980)) but in *Loftin* (TC Memo 1986-322) thirty days was deemed adequate time to file a petition.

The IRS bears the burden of proving both the notice was mailed and the date of mailing. The IRS usually establishes proof of mailing by introducing Postal Service Form 3877, which lists the names and addresses of taxpayers for whom the IRS mailed envelopes on a particular day and records the registered or certified number for each envelope. The IRS must still produce a copy of the notice of deficiency and cannot rely only on Form 3877 as proof an item was mailed

when issuance of a notice of deficiency is in dispute. In *Butti* (TC Memo 2008-82 (4/3/08)) the IRS lost the administrative file, had no copies of the notice of deficiency, did not establish a final notice ever existed, and relied on Form 3877 without other evidence. The petitioner won.

The IRS notice must be **mailed**, not received, within the statute of limitations period to be valid. In *Lindstrom* (TC Memo 2007-243) the petitioner moved a number of times in 2006 and received the notice of deficiency with 75 days left to file the petition. His petition was filed late, but taxpayer argued that the 90-day period began when the post office forwarded the notice of deficiency to its final destination. Although the petition was only 2 days late there is no provision for any extension of time. Even though IRS sent the notice of deficiency to the wrong address, taxpayer received it with sufficient time to timely respond.

LAST KNOWN ADDRESS

When a notice or document is sent to a taxpayer's "last known address" it is legally effective even if the taxpayer never receives it. A taxpayer's last known address is defined in Reg. §301.6212-2(a) as the address on the taxpayer's most recently filed and properly processed return unless the IRS is given clear and concise notification of a different address. The Court has defined it to be the taxpayer's "… last permanent address or legal residence known by the Commissioner, or the last known address of a definite duration to which the taxpayer has directed the Commissioner to send all communications during such period." (*Brown,* 78 TC 215, 218 (1982)). As such, the taxpayer can only have one last known address at any given time.

Changing the address on Form 4868, Application for Automatic Extension of Time to File U.S. Individual Income Tax Return, or on Form 2848, Power of Attorney and Declaration of Representative, is not sufficient to change IRS records in Damian Gregory and Shayla Gregory (152 TC 7 (3/13/19)). The actual forms themselves make it clear they do not provide the Commissioner with clear and concise notification that the taxpayer's address has changed.

Under Rev Proc 2010-16 (effective 6/1/10) the IRS will automatically update a taxpayer's address of record based on a new address the taxpayer provides the USPS that is retained in the USPS's National Change of Address database. If the taxpayer no longer wants the address of record to be on the most recently filed return**, clear and concise notification** must be provided to the IRS.

Generally, a taxpayer's last known address is defined as the address on the taxpayer's most recently filed and properly processed tax return, unless the IRS is given clear and concise, usually written, notification of an address change.

If a joint return was filed and either taxpayer establishes a separate residence, each taxpayer should provide clear and concise notification of a current address. The IRS maintains address records for gift, estate and generation-skipping transfer tax returns separate from the address

records for individual tax returns, so separate notification of an address change is required for each type of return.

Even though the IRS updates based upon the USPS notification, taxpayers are advised to notify the IRS directly to ensure a "timely and accurate" update of the information. For this purpose, a "return" is not an application for extension of time (Form 4868) or powers of attorney, so filing a new address on Form 2848 is not sufficient to update an address record.

A return generally is considered properly processed after a 45-day processing period that begins the day after receipt of the return by the Internal Revenue Submission Processing Campus – if the return is received prior to the due date, the 45-day processing period begins after the due date of the return. If the return is not filed in a processable form, the 45-day processing period begins the day after the error that caused it to be unprocessable is corrected. Due to the high volume of individual returns during filing season, if the return is received in processable form by the IRS between 2/14-6/1 the return is considered properly processed on 7/16.

Clear and concise written notification is a written statement signed by the taxpayer and mailed to an appropriate Service address asking the IRS to change the address of record. The notification must contain the taxpayer's full name and old address as well as the taxpayer's social security number, individual taxpayer identification number, or employer identification number. Filers of a joint return should provide both names, social security numbers, and signatures. Individuals who changed their last name should provide the last name shown on the most recently filed return and the new last name.

The **written notification** must be specific as to a change of address. A new address on the letterhead is not sufficient to change a taxpayer's address of record. Form 8822, *Change of Address*, can be used to provide the appropriate written notification. Correspondence sent by the IRS that requires a taxpayer response that is returned to the IRS with corrections of the address info is clear and concise written notification.

Clear and concise **electronic notification** is one submitted through a secure application found at irs.gov. A secure application requires the taxpayer to verify identity before accessing the application. Other forms of electronic notification, including electronic mail sent to an IRS email address does NOT meet the definition of clear and concise notification.

Clear and concise **oral notification** is a statement made by a taxpayer in person or directly via telephone to an IRS employee who has access to the Service Master File informing the IRS employee of the address change.

Except where notices are required by law to be sent to the taxpayer's last known address, the revenue procedure does not require the IRS to continue to send notices to an address furnished

by the taxpayer when it is determined after a delivery attempt that the taxpayer cannot actually be contacted or located at that address.

BANKRUPTCY PROCEEDINGS

The IRS can issue a notice of deficiency while the taxpayer is subject to bankruptcy court proceedings, but an automatic stay prohibits a taxpayer in bankruptcy from filing a petition. The suspension period lasts for the time the taxpayer cannot file because of the automatic stay plus 60 days thereafter.

In *Settles* (138 TC 19 (5/8/12)) the petitioner filed a bankruptcy court petition after filing the Tax Court petition and later filed a motion to dismiss his petition. Generally, in a deficiency case once a petition is filed the taxpayer cannot dismiss the petition and a decision is entered against the taxpayer who fails to prosecute a case, but in a collection case, the petitioner can withdraw the petition. The Court found that it could dismiss the case even while the bankruptcy automatic stay was effective.

RESCINDING THE NOTICE OF DEFICIENCY

With the consent of the taxpayer, the Secretary may rescind any notice of deficiency mailed to the taxpayer. Under §6212(d), any notice so rescinded is no longer treated as a notice of deficiency. The taxpayer does not have the right to file a Tax Court petition using a rescinded statutory notice.

FILING PLEADINGS WITH THE COURT

FILING – RULE 22

Generally, except for a paper filed electronically in accordance with electronic filing procedures established by the Court, a paper must be filed with the Clerk in Washington, D.C. during business hours. A judge or special trial judge presiding at a session of the Court may permit or require a paper to be filed at that session, and the Court may direct that a paper be filed in accordance with another procedure other than the general rule.

Remember, a paper is considered timely filed if it is electronically filed before 11:59 p.m., Eastern Time, on the last day of the applicable period for filing.

COMPUTATION OF TIME (RULE 25)

When counting the number of days, Saturday, Sundays and all legal holidays are counted unless the period allowed is less than 7 days. Know that for practical purposes on this exam, you will be counting those days in your date calculations.

If a period is stated in days or a longer unit of time, exclude the day of the event that triggers the period; count every days, and include the last day of the period (but if that last day is a Saturday, Sunday, or legal holiday, the period runs until the end of the next day that is not a Saturday, Sunday or legal holiday.

If the Clerk's Office is inaccessible on the last day of a filing period, the time for filing any paper other than a petition is extended to the first accessible day that is not a Saturday, Sunday or legal holiday. See §7451(b) for circumstances under which the period for filing a petition is tolled when the filing location is inaccessible; generally, the relevant time for filing such petition is tolled for the number of days within the period of inaccessibility plus an additional 14 days. A lapse of appropriations is included in this definition.

Unless otherwise defined, the last day ends:

A. For electronic filing at 11:59 p.m. Eastern Time, and
B. For filing by other means, when the Clerk's Office is scheduled to close.

Under §6213(a) the time for filing a Tax Court petition is within 90 days, or 150 (under certain circumstances), after the authorized notice of deficiency is **mailed**. Since the time frame in which to file a petition is strictly defined by statute, except as discussed in Collection Due Process cases in light of *Boechler*, practitioners must be able to count the appropriate number of days. Filing a petition even one-day late results in a dismissed petition and potential malpractice issues with the client. In fact, the Tax Court confirmed that the 90-day filing period on a deficiency case is jurisdictional in *Hallmark Research Collective* (159 TC 6 (11/29/22)); not all agree with the Tax Court's unanimous decision, and we may see this challenged over the next few years, so know the proper answer for your exam.

Counting the 90-day period begins on the day **after** the notice of deficiency is mailed. If the 90-day period ends on a Saturday, Sunday, or legal holiday recognized in the District of Columbia (not state holidays), the 90-day period ends on the next day that is not a Saturday, Sunday, or recognized holiday.

The 90 days allowed by the notice of deficiency applies to most taxpayers, but it becomes 150 days when:

- the taxpayer is out of the country for the entire 24 hours of the day the notice of deficiency is mailed, **or**
- the notice is mailed to an address outside the country (even if the taxpayer actually is in the country).

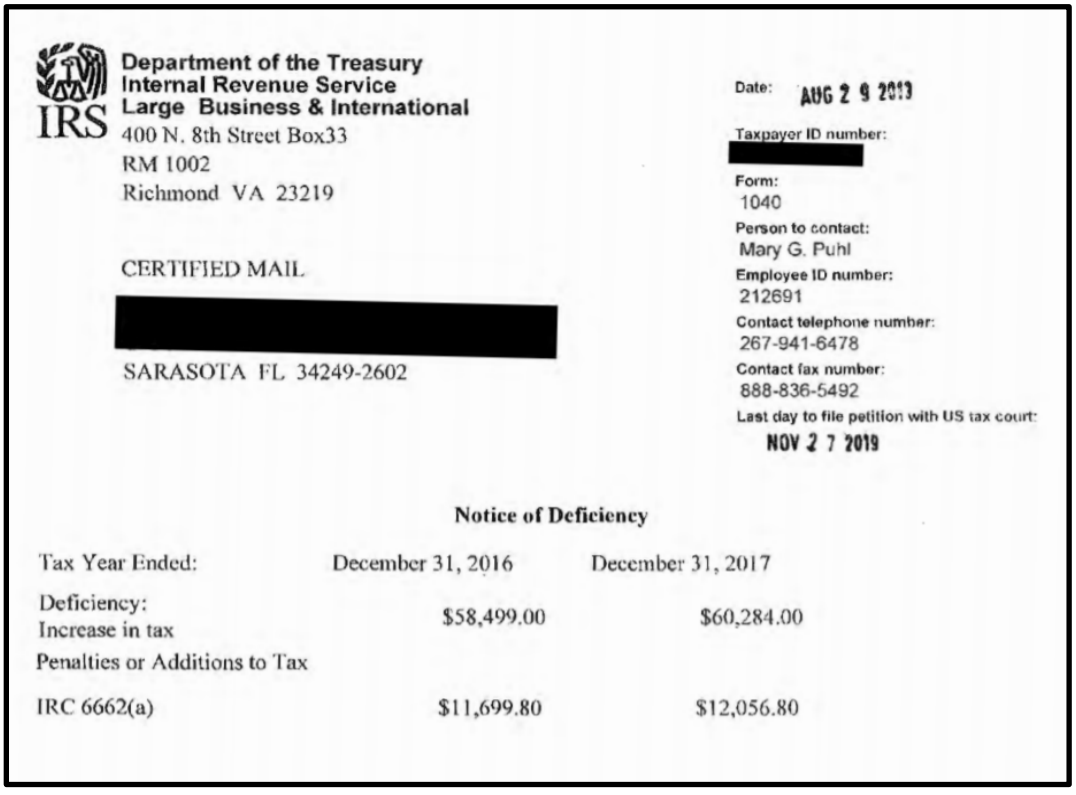
Start counting the 90-day period on the day after the notice of deficiency is mailed.
If the 90-day period ends on a Saturday, Sunday, or legal DC holiday, move forward to the next non-DC holiday or day that is not a Saturday or Sunday.
The 90 days is statutory, although it may be 150 days in some situations.

If a joint deficiency notice is mailed to a husband and wife while one of them is out of the country, the 150-day period applies to both spouses (*Lawton* (TC Memo 1979-203)).
The 150-day petition period applied when the petitioner and her daughters moved to Canada even though she maintained a post office box in the US and was in the country when the notice of deficiency was mailed – she had established residency in Canada and her petition was considered timely when filed before 150 days. Her daughters were enrolled in Canadian schools, she provided proof of rent payments, and she had a Canadian permanent resident card and driver's license (*Smith*, 140 TC 3 (2/28/13)).

Taxpayer has burden of proof to establish she or he was physically outside the U.S. when the notice arrived. The rule applies to taxpayers who can prove they were vacationing overseas (*Burnside*, 77 TC Memo (CCH) 1568 (1999)), but not to a taxpayer who would have received the notice before leaving the country had he not suspended mail delivery (*Whitten*, 65 TC Memo (1993)).

The notice of deficiency is required by §6213(a) to indicate the last day for filing a Tax Court petition, but the notice is valid even if the date is wrong. It is imperative to count the number of days when preparing any petition. The taxpayer may rely upon the date shown on the notice of deficiency if it is longer than the 90-day filing period. If it is less than the 90-day filing period, the taxpayer statutorily still has 90 days from issuance of the notice of deficiency in which to file their petition.

SAMPLE NOTICE OF DEFICIENCY WITH LAST DAY FOR FILING



Department of the Treasury
Internal Revenue Service
Large Business & International
400 N. 8th Street Box33
RM 1002
Richmond VA 23219

CERTIFIED MAIL

[redacted]

SARASOTA FL 34249-2602

Date: AUG 2 9 2019

Taxpayer ID number:
[redacted]

Form:
1040

Person to contact:
Mary G. Puhl

Employee ID number:
212691

Contact telephone number:
267-941-6478

Contact fax number:
888-836-5492

Last day to file petition with US tax court:
NOV 2 7 2019

Notice of Deficiency

Tax Year Ended:	December 31, 2016	December 31, 2017
Deficiency: Increase in tax	$58,499.00	$60,284.00
Penalties or Additions to Tax		
IRC 6662(a)	$11,699.80	$12,056.80

FOUR METHODS TO COUNT DAYS

We will demonstrate 4 different methods to count the number of days in a petition filing period. Find the method that works best for you and practice so it is automatic, as this question is tested each cycle.

The methods are:

1. Chief Counsel Method
2. By Calendar Date
3. Weeks Shortcut
4. Count 90 Days

SAMPLE COUNTING THE DAYS, CHIEF COUNSEL METHOD

	Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
July				1	2	3	4
	5	6	7	8	9	10	11
	12	13	14	15	16	17	18
	19	20	21	22	23	24	25
	26	27	28	29	30	31	
August							1
	2	3	4	5	6	7	8
	9	10	11	12	13	14	15
	16	17	18	19	20	21	22
	23	24	25	26	27	28	29
	30	31					
September			1	2	3	4	5
	6	7	8	9	10	11	12
	13	14	15	16	17	18	19
	20	21	22	23	24	25	26
	27	28	29	30			
October					1	2	3
	4	5	6	7	8	9	10
	11	12	13	14	15	16	17
	18	19	20	21	22	23	24
	25	26	27	28	29	30	31

Holidays in the District of Columbia during the months in the table above are: (1) Friday, July 3,2020; Monday, September 7, 2020; and Monday, October 12, 2020.

If the filing date is 7/6, the 90 days are calculated as follows:

31 days in July – 6 (filing day) = 25
+ 31 days August = 56
+ 30 days September = 86
+ 4 days October = 90

Due date 10/4 if not a Saturday, Sunday, or DC holiday – move forward to 10/5 if it is
Answer is 10/5

ALTERNATIVE COUNTING THE DAYS METHOD – BY CALENDAR DATE

	Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
July				1	2	3	4
	5	6	7	8	9	10	11
	12	13	14	15	16	17	18
	19	20	21	22	23	24	25
	26	27	28	29	30	31	
August							1
	2	3	4	5	6	7	8
	9	10	11	12	13	14	15
	16	17	18	19	20	21	22
	23	24	25	26	27	28	29
	30	31					
September			1	2	3	4	5
	6	7	8	9	10	11	12
	13	14	15	16	17	18	19
	20	21	22	23	24	25	26
	27	28	29	30			
October					1	2	3
	4	5	6	7	8	9	10
	11	12	13	14	15	16	17
	18	19	20	21	22	23	24
	25	26	27	28	29	30	31

Holidays in the District of Columbia during the months in the table above are: (1) Friday, July 3,2020; Monday, September 7, 2020; and Monday, October 12, 2020.

If the filing date is 7/6, the 90 days are calculated as follows:

7/6 + 30 days = 8/5 (July has 31 days)
8/5 + 30 days = 9/4 (August has 31 days)
9/4 + 30 days = 10/4

Due date 10/4 if not a Saturday, Sunday, or DC holiday – move forward to 10/5 if it is
Answer is 10/5

ALTERNATE COUNTING THE DAYS METHOD – WEEKS SHORTCUT

	Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
July				1	2	3	4
	5	6	7	8	9	10	11
	12	13	14	15	16	17	18
	19	20	21	22	23	24	25
	26	27	28	29	30	31	
August							1
	2	3	4	5	6	7	8
	9	10	11	12	13	14	15
	16	17	18	19	20	21	22
	23	24	25	26	27	28	29
	30	31					
September			1	2	3	4	5
	6	7	8	9	10	11	12
	13	14	15	16	17	18	19
	20	21	22	23	24	25	26
	27	28	29	30			
October					1	2	3
	4	5	6	7	8	9	10
		12	13	14	15	16	17
		19	20	21	22	23	24
	25	26	27	28	29	30	31

Holidays in the District of Columbia during the months in the table above are: (1) Friday, July 3,2020; Monday, September 7, 2020; and Monday, October 12, 2020.

Start with the day of the NOD (7/6), go down 13 weeks (10/5), then subtract 1 day (10/4). Check to see if that day is a Saturday, Sunday, or DC holiday – if it is, move to the next day. Answer is 10/5

ALTERNATE COUNTING THE DAYS METHOD – COUNT 90 DAYS

	Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
July				1	2	3	4
	5	6	7	8	9	10	11
	12	13	14	15	16	17	18
	19	20	21	22	23	24	25
	26	27	28	29	30	31	
August							1
	2	3	4	5	6	7	8
	9	10	11	12	13	14	15
	16	17	18	19	20	21	22
	23	24	25	26	27	28	29
	30	31					
September			1	2	3	4	5
	6	7	8	9	10	11	12
	13	14	15	16	17	18	19
	20	21	22	23	24	25	26
	27	28	29	30			
October					1	2	3
	✖	5	6	7	8	9	10
	11	12	13	14	15	16	17
	18	19	20	21	22	23	24
	25	26	27	28	29	30	31

Holidays in the District of Columbia during the months in the table above are: (1) Friday, July 3,2020; Monday, September 7, 2020; and Monday, October 12, 2020.

Start with the day after the notice day (9/7) and count the days:
July = 25
August = 31
September = 30
October = 4 is the 90th day. ALWAYS check to see if that day is a Saturday, Sunday, or DC holiday – if it is, move to the next day (10/5). Next, look back at the problem to see what the last day is for filing – none was given here, so 10/5/20 is your answer.

ELECTRONIC FILING – RULE 26
Unless the Court orders otherwise, it will accept for filing by a party any papers submitted, signed or verified by electronic means that comply with procedures established by the Court.

For parties represented by counsel:
Electronic filing is required for all papers filed by a party represented by counsel, unless the Court orders otherwise.

Mandatory electronic filing does not apply to:

A. Any papers not eligible for electronic filing (see the Court's electronic filing instructions on the Court's website for a complete list of those papers);

B. Any counsel in a case who for good cause shown is granted an exemption from the electronic filing requirement.

For pro-se (self-represented) petitioners is not subject to mandatory electronic filing requirements, including a petitioner assisted by a low-income taxpayer clinic or Bar-sponsored pro bono program.

DAWSON GUIDANCE FOR PRACTITIONERS

Docket Access With a Secure Online Network (DAWSON) is the Tax Court's electronic filing and case management system. It is designed to make it easier for parties and the Court to start a Tax Court case, file and process documents, and manage cases. It also has a public search feature where the public can search for unsealed cases, orders, and opinions.

Once you are admitted to practice you will be provided with your log in credentials.

The Court published a Practitioner User Guide (12/1/22) that provides an introduction to the system. Take a few moments to glance at it just to get a sense of what DAWSON allows you to do: https://ustaxcourt.gov/resources/dawson/DAWSON_Practitioner_Training_Guide.pdf

The Court published a Self-Represented (Pro Se) User Guide (12/1/22) that can be found: https://ustaxcourt.gov/resources/dawson/DAWSON_Petitioner_Training_Guide.pdf

EXAM ALERT!

For 2023, be aware of the new e-file petition rules.

PLEADINGS

The second element to obtaining Tax Court jurisdiction over a tax controversy is a timely filed petition. There are no requirements that the petition be on a certain form, but under Rule 34 the petition must contain the information required by the rules and must identify the issues presented; if it does not comply with the rules, the case may be dismissed.

Under rules as of 4/8/23, the petition can be uploaded electronically if the user has access to DAWSON, or it can be filed in person or by mail. If electronically filing through Dawson you:

- Prepare the petition as associated documents and save them into individual PDF files
- Do not efile a Request for Place of Trial
- Upload everything at one sitting; you cannot save your work and come back to it
- Do NOT file a petition electronically and by mail

Remember that timely filed for an electronic transmission means uploaded no later than 11:59 pm Eastern Time on the last date to file; petitions received after this time are untimely and the case may be dismissed for lack of jurisdiction.

The filing period is statutory and there are no extensions of time granted (although under §7508 and §7508A, the time period to file the petition may be tolled or suspended if the taxpayer is serving in a combat zone or is affected by a Presidentially-declared disaster). An untimely filed petition will be dismissed and cannot be refiled.

Gerald Kafka, at the Ali-ABA Tax Controversy conference in February 2006, indicated that Rule 34 has 3 basic provisions: I am who I am, I received a notice of deficiency, and I disagree with the IRS. The art of the petition is what you say and how you say it, which requires early-on that the practitioner knows the game plan. Also, he recommends putting §7491 shift of burden to IRS in all petitions – this is certainly a case of 'you don't ask, you don't get' because unless it is requested by the petitioner, the Tax Court cannot shift burden on its own.

ELEMENTS OF A PETITION (RULE 34)

If the taxpayer timely files a petition but does not state a claim for which relief can be granted, the Court may dismiss the petition. The petition need not be on a particular form, but in order to be properly filed, it must be "substantially in accordance with the Tax Court Rules governing pleadings (Rules 30-34)."

Note that Rule 34 is laid out slightly differently than in prior exam cycles, so this information is now updated:

Deficiency or Liability Action:

(1) Content of petition substantially in accordance with Form 1 petition) and must contain

A. If the petitioner is an individual, the petitioner's name and state of legal residence
B. If the petitioner is not an individual, the petitioner's name and principal place of business or principal office or agency
C. The petitioner's mailing address and the office of the IRS with which the tax return for the period in controversy was filed.
D. The date of the notice and the city/State of the Internal Revenue Office that issued the notice, or other allegations, establishing the Court's jurisdiction.
E. If the petitioner's name differs from the name on the notice, a statmeen6 of the reasons for the difference.
F. The amount of the deficiency or liability determined by the Commissioner, the nature of the tax, and the year or years or other periods for which the commissioner determined the deficiency or liability. If only a part of the determination is disputed, the petition must state and identify the approximate amount of taxes in dispute.
G. In separately lettered paragraphs, clear and concise assignments of each and every error, including any assignments of error as to which the burden of proof is on the Commissioner, that the petitioner alleges the Commissioner made in the determination of the deficiency or liability. Any issue not raised in the assignments of error will be deemed conceded.
H. In separately lettered paragraphs, clear and concise statement of the facts on which the petitioner relies to establish the errors alleged in the petition, except for those

assignments of error as to which the burden of proof is on the Commissioner.

I. Any special matters as required by Rule 39.
J. A request for the relief that the petitioner seeks.
K. The signature, mailing address, email address, and telephone number of each petitioner or petitioner's counsel, as well as counsel's Tax Court bar number. The use of a properly completed Form 2 petition satisfies the requirements of this Rule.

(2) Copy of the notice of deficiency or notice of liability must be attached to the petition.

(3) Separate Petition; Permissive Joinder; Severance:

(A) Separate petition: Ordinarily a separate petition must be filed with respect to each notice of deficiency or notice of liability.

(B) Permissive Joinder of Parties and Claims: A single petition may be filed with respect to all notices of deficiency or notices of liability issued –

(i) to the same person; or

(ii) to more than one person, such as two spouses, and each person contests the notice or notices.

(C) Severance: The Court may issue orders, including an order for separate trials, to protect a party against embarrassment, delay, undue expense or other prejudice resulting from the joinder of parties or claims.

For petitions in other actions, Rule 34 directs the reader to the requirements in other Tax Court Rules relevant to that type of petition.

The use of a properly completed Form 2 (petition) satisfies the requirements of this Rule.

Only the signed original of each petition must be filed (see Rule 23(a)(3) and the Court's electronic filing instructions on the Court's website for that information).

A claim for reasonable litigation or administrative costs must not be included in the petition (specified now in Rule 34).

Form 4 is the Statement of Taxpayer Identification Number
[https://ustaxcourt.gov/resources/forms/Form_4_Statement_of_Taxpayer_Identification_Number.pdf]

Form 5 is the Request for Place of Trial
[https://ustaxcourt.gov/resources/forms/Form_5_Request_for_Place_of_Trial.pdf]

Form 6 is the Corporate Disclosure Statement
[https://ustaxcourt.gov/resources/forms/Corporate_Disclosure_Statement_Form.pdf]

PETITION SAMPLE LANGUAGE

Errors:

d. The Commissioner erred in determining that Petitioner is liable for the penalty under section 6662(a) of the Internal Revenue Code with respect to the calendar years 2010 and 2011.

Facts Relied Upon:

6. As the basis of its case, Petitioner relies on the following:

a. Petitioner accurately stated its gross receipts for the calendar years 2010 and 2011.

Request for Relief/Prayer for Relief:

WHEREFORE, Petitioner prays that the Court provide the following relief:

1. Determine that there are no tax deficiencies for Petitioner's calendar years 2010 and 2011; and

If the petitioner is an entity, a statement of ownership must be filed with the petition.

Currently, the Court only accepts efiled petitions uploaded through their DAWSON system, or original petitions, which must be filed with the Clerk of the Tax Court, either by mail, approved private delivery service, or in person during normal court hours.

Along with the petition the taxpayer should also file a Statement of Taxpayer Identification Number and an original Request for Place of Trial (Rule 140). That form is a 'check the box' form that lists the various places offered for trial and is where taxpayer indicates he or she wants the case to be heard. If the taxpayer fails to make a request, the IRS can select the city and will do so as part of filing the Answer. If a party wants to change the place of trial, they must file a motion to that effect and state fully the reasons for the change. The electronic imaging implemented by the Court means copies of the forms are no longer needed; only a signed original of each form is required.

Under Rule 35, upon the Clerk's receipt of the petition, the case is entered on the docket and assigned a number. The Clerk notifies the parties of the docket number, which must thereafter be included on all papers filed on the case and in any correspondence with the Court.

The Clerk serves a copy of the petition on the IRS. All other papers served, except as noted in the Rules or directed by the Court, are served by the party filing the paper. Service can even be made by electronic means if the party served consented in writing.

Under Rule 20, a disclosure statement is required for any nongovernmental corporation, partnership or LLC filing a petition with the Court. The disclosure statement identifies any parent corporation or publicly held entity owning certain interests in the entity.

MEMORY SUMMARY – PETITION ELEMENTS
Memorize elements, or look up Rule 34 and copy information during the exam. This is for a notice of deficiency or liability
ID – petitioner name, state of residence, mailing address, IRS office where filed
NOD – date of Notice of Deficiency (NOD), IRS office that issued
TAX – amount of NOD, nature, years, and amount of liability believed owed, if different than IRS
ERRORS – clear, concise, lettered statements assignment of errors alleged to occur
FACTS – clear, concise lettered statements • taxpayer's burden
REQUEST/PRAYER – for relief
SIGN – and mailing address, email address, telephone number of taxpayer (counsel + Bar #)
ATTACH - Copy of NOD, relevant notices

$60 fee, Statement of Taxpayer Identification, and Request of Place of Trial are also required, but prior full point exam answers don't always state these items.

Waiver of Filing Fee
The $60 filing fee must accompany the petition or the Court can dismiss the petition and sustain the deficiency. The filing fee can be waived if the taxpayer files an affidavit that contains sufficient financial information to establish an inability to pay.

Joint Petition
Ordinarily a separate petition is filed for each notice of deficiency or liability. A joint petition may be filed when there are multiple notices of deficiency or liability issued to one individual. A husband and wife can file a joint petition, even if separate notices of deficiency were issued to them. If the notice of deficiency is directed to more than one person, each person who desires to contest the deficiency can file separate or joint petitions. Filing a joint petition requires payment of only one $60 filing fee.

But under Tax Court Rule 61, no person to whom a notice of deficiency or a notice of liability has been issued may join with any other such person in filing a petition in the Court except as may be permitted under Rule 34(a)(1).

Simplified Petition (Form 2)
This form can be used to initiate a case, but it may not allow you sufficient space to address the allegation of errors or facts supporting those errors. It is permissible to attach additional statements to include all errors and facts.
[https://ustaxcourt.gov/resources/forms/Petition_Kit.pdf]

PRIVACY PROTECTION FOR FILINGS MADE (RULE 27)
Generally, all reports of the Tax Court and all evidence received by the court are public records open to public inspection. This rule was voluntarily added to meet requirements of the E-Government Act of 2002 even though the Tax Court was not specifically mentioned in the Act. It requires that redacted filings made electronically or on paper omit specific information:

- Taxpayer identification numbers (SSN and EIN)
- Dates of birth (only the year should appear)
- Names of minor children (only initials should appear)
- Financial account numbers (only the last four digits)

The Court may also order a filing that contains any of this information be made under seal without redaction. Protective orders can be issued (for good cause) requiring redaction of additional information or the Court may issue a protective order provided by Rule 103(a).

Parties or nonparties who make the filing are responsible for redacting the information, but a person may correct an inadvertent disclosure of identifying information in a prior filing by submitting a properly redacted duplicate filing (complete with attachments) within 60 days of the original filing without leave of the Court; after that, it is allowed only by leave of the Court.

There are provisions under Rule 227 for a petitioner or intervenor (in a §6015 case) to remain anonymous, but a reason must be given for the anonymity. In *Anonymous* (127 TC 6 (9/6/06)) the petitioner was a foreign national with a relative that had been kidnapped and held for ransom. The Court sealed the record because the significant risk of physical harm to petitioner and family outweighed the public interest in access to court proceedings under these circumstances.

ANSWER (RULE 36)
The Commissioner must respond within 60 days after date of service of the petition or has 45 days from that date in which to file a motion with respect to that petition. Motions that can be filed include a motion for a more definitive statement, a move to strike, or a move to dismiss (see the appropriate section for a discussion on Motions). At its discretion, the Court may grant the IRS additional time in which to respond.

The Answer must advise the petitioner and the Court fully of the nature of the defense. As such, the Answer must contain a specific admission or denial of each material allegation in the petition. If the Commissioner does not have knowledge or information to form a belief about the truthfulness of an allegation, the Commissioner must so state; this acts as a denial. The Commissioner may deny or qualify only part of an allegation. Any issue not addressed in the answer is deemed conceded. Answers are required in all S cases beginning late 2006.

The Answer must also contain a clear, concise statement of every ground on which the Commissioner relies and has burden of proof. It must also provide the facts in support of its position.

Any affirmative defense or increased deficiency raised by the respondent in the Answer must also provide clear, concise statements of the grounds and facts pertaining to those matters. If petitioner does not provide a copy of the notice of deficiency or any other relevant jurisdictional document was not attached as an exhibit to the petition, the Commissioner will include a copy of the document with the answer, state that the document is not available at the time the answer is filed, or state that no such document was issued. If the document isn't available when the answer is filed, the Commissioner must provide it, without leave of the Court, once it becomes available.

In Disclosure cases, the IRS has only 30 days in which to move or file an Answer.

SAMPLE LANGUAGE - ANSWER

ANSWER

RESPONDENT, in answer to the petition filed in the above-entitled case, admits and denies as follows:

1. Admits.

2. Admits.

3. Admits; except denies that the notice of deficiency attached to the petition served on respondent was marked as Exhibit A.

4. Admits that the determined deficiencies, additions to tax, and penalties are as stated.

5. Denies respondent erred as alleged.

6. a. through d. Denies.

e. Denies for lack of sufficient knowledge or

REPLY (RULE 37)

A Reply may not be required, but one must be made if the Answer raises new issues or increases the tax deficiency; the Reply indicates which items asserted in the Answer are disputed. If a Reply is not required, the case is at issue when the Answer is filed. If a Reply is required, the case is at issue either:

- upon filing of the Reply, **or**
- upon entry of an order disposing of a motion with respect to failure to file the Reply, **or**
- at the expiration of the 45-day filing period for motions.

If a Reply is required because of new issues raised in the Answer, the petitioner has 45 to respond or 30 days to move. The petitioner must admit or deny each material allegation in the Answer and all the facts for which the Commissioner has the burden of proof. If the petitioner has no knowledge or information sufficient to form a belief about the truthfulness of an allegation, the petitioner must say so; that statement has the effect of a denial. Any issue not addressed in the Reply is deemed conceded.

The Reply must contain a clear, concise statement of every ground on which the petitioner relies with supporting facts. Taxpayer must also provide supporting facts for any statement he or she disagrees with that is contained within the Answer for which the Commissioner bears burden of proof.

If a Reply is filed, every affirmative allegation set out in the answer and not expressly admitted or denied in the Reply is deemed admitted. If a Reply is not filed, the affirmative allegations in the Answer will be deemed denied unless the Commissioner, within 45 days after expiration of the time for filing the reply, files a motion that specified allegations in the Answer be deemed admitted. Any new material contained in the reply must be deemed to be denied.

If a Reply is not filed, the Commissioner's affirmative allegations are deemed denied, unless the Commissioner files a motion requesting that specific allegations be deemed admitted within 45 days after expiration of the time for the Reply. Any new material in the Reply is similarly deemed denied, except in declaratory judgment actions when affirmative allegations in the Answer are deemed admitted if a Reply is not filed.

JOINDER OF ISSUE (RULE 38)

A case is at issue when the Answer is filed, or when the Reply is filed, if one is required. The date is important because formal discovery may not commence until 30 days after joinder of issue occurs.

SPECIAL MATTERS (RULE 39)

All affirmative defenses, including res judicata, collateral estoppel, estoppel waiver, duress, fraud and the statute of limitations must be set forth in the party's pleadings. An affirmative defense is an answer to a complaint that is more than just a denial of the charges; an affirmative defense presents evidence or arguments in the arguing party's favor.

A statute of limitations argument must be pleaded in taxpayers' original petition or the taxpayer is deemed to have conceded the issue.

Affirmative Defenses
Whether raised by the petitioner or the respondent, affirmative defenses must be pleaded with particularity and proof must be offered in the pleading. The party that raises these defenses has the burden of proof for the issues, even if the burden normally rests with the other party.

Res judicata means "a thing already judged." In this doctrine a court's final judgment is conclusive against the same parties in any further, identical cause of action between the parties. The intention is to prevent repetitious lawsuits on the same causes of action. Parties are bound on all issues that were tried and all that could have been tried.

> Example: a taxpayer with a large sum of cash receives a termination assessment (later reduced to summary judgment) in the district court for the part of the year up to the discovery of the cash. Later the IRS issues a deficiency notice for the entire taxable year that included the discovery date of the cash. The taxpayer timely files a petition with the Tax Court and the IRS moves to claim that the summary judgment received in district court is res judicata in Tax Court. The claim is denied because the termination assessment only covered a partial tax year, and the notice of deficiency covered the entire tax year. Since these are not identical causes of action, the trial moves forward.
>
> Example: *Frances Rogers* (TC Memo 2017-130 (7/3/17)) is highly educated with a bachelor's degree in chemistry, a master's degree in biochemistry, a MBA, and a doctorate in educational administration along with a law degree and various classes in tax and accounting. She participated in the tax preparation with her husband (who is a tax attorney admitted to practice before the Tax Court). She never raised a claim for relief under §6015 at any stage during the 2004 deficiency case, which was decided by the Tax Court on 7/17/14. On 9/17/14 petitioner submitted Form 8857, *Request for Innocent Spouse Relief*, where she requested relief for all joint returns filed with her husband for 2002-2012 under §6015(b) or (f).
>
> Under the judicial doctrine of res judicata, when a court of competent jurisdiction enters a final judgment on the merits of a cause of action, the parties to the action are bound by every matter that was or could have been offered and received to sustain or defeat the claim. The doctrine promotes judicial economy by precluding repetitious lawsuits. Common law principles of res judicata generally bar a party to a prior proceeding for the same tax year from seeking relief from joint and several liability regardless of whether the party raised the claim in the prior proceeding.
>
> §6015(g)(2) modifies the common law doctrine of res judicata with regards to claims for relief from joint and several liability. A taxpayer is not barred from requesting relief under §6015(b), (c) or (f) if 1) relief under §6015 was not an issue in the prior

proceeding and 2) the taxpayer did not participate meaningfully in the prior proceeding. "Meaningful participation" is not defined in the §6015(g)(2) or regulations, nor has it been clearly defined by the Tax Court.

Specific acts such as signing court documents may be indicators that the taxpayer participated meaningfully, but 'merely complying' with the other spouse's instructions to sign the pleadings and other documents that were filed in the prior litigation is not conclusive. The Court will consider the taxpayer's level of education and sophistication

In Form 8857 the petitioner portrayed herself as having a near complete lack of knowledge of sophistication with respect to business and financial matters, and that before 2009 she "was not capable of understanding a checking account or credit card statement" and that she is still "unable to understand basic financial statements." She testified that during the 2012 trial she "had no idea what was happening." She was not credible. She is an attorney and at previously attended at least one trial involving deficiencies determined for one of her husband's business entities as the Tax Court issued an opinion upholding the deficiency determined in the couple's joint income tax for 2003.

If a petition is timely filed but fails to state a claim upon which relief can be granted, the Tax Court can dismiss the petition and enter a decision that sustains the deficiency under §7459(d). That decision is res judicata.

Collateral estoppel only applies to situations where the second lawsuit is identical in all respects to a matter decided in a previous lawsuit involving identical events and facts and prevents lesser offenses from being tried.

Example: *James C Platts* (TC Memo 2018-31 (3/19/18)) had a multitude of problems with returns filed and classification of activity between him and a C corporation that he was sole owner and president of. He was indicted under §7201 on one count of income tax evasion and 4 counts of evasion of withholding tax from wages and FICA taxes and was convicted and sentenced to 30 months in prison in 2008. He later pleaded guilty to money laundering, mail fraud and conspiracy charges. A conviction for income tax evasion under §7201 collaterally estops a taxpayer from denying fraudulent intent under §6501(c)(1) for that year. The conviction conclusively established that the defendant committed tax fraud for that year.

Example: In *Brincat, Arthur and Brincat, Edgar*, TC Memo 2001-124 (5/25/01) a California court determined that a transfer was really a sale. The brothers appealed, and a state appellate court held they were collaterally estopped from relitigating the issue. Edgar did not report the proceeds on his return, and Arthur failed to file a return. The Tax Court found the brothers were collaterally estopped from arguing that the sales proceeds were not taxable as the issue was previously litigated by another court.

Statute of limitations as an affirmative defense means the party believes the Tax Court is barred from action on this matter because the relevant statute of limitations expired.

Typically for the taxpayer this indicates a belief the IRS issued the notice of deficiency beyond the appropriate statute date. Typically for the government this is the belief that the taxpayer filed a petition outside the relevant 90 or 150-day time period.

DEFINITIONS

Each allegation asserted in any pleadings must either be admitted or denied. If the party has no knowledge or information sufficient to form a belief about the truthfulness of an allegation, the party must so state; that statement has the effect of a denial.

Admit is to concede or agree with the assertion made.
Deny is to disagree with the assertion made.
Silence on any matter is considered a deemed admission.

PETITION PROBLEMS

Other than the equitable tolling issue related to CDP petitions from *Boechler*, there are no second chances if the petition is not filed in a timely manner; the IRS attorney simply moves to have the petition dismissed (this was confirmed for deficiency cases in *Hallmark Research Collective*, 159 TC 6 (11/29/22), but is likely to be considered on other types of jurisdiction over the next year or longer). If the taxpayer fails to state a claim for which relief can be granted, the petition is dismissed and the Court will sustain the deficiency for the IRS. If an issue is omitted from a petition, the taxpayer may be barred from bringing the missing issue before Court.

The Court may be more lenient in its rulings with a small tax, or S, case petition. Since the petitioner often appears pro se, the Court may grant the taxpayer far greater leeway than would occur in a regular case proceeding.

Can the petition be changed after it is filed? It is possible to amend a petition after the trial is complete to conform to the evidence and issues tried by Court (see Rule 41 discussion).

AMENDED PLEADINGS (RULE 41)

As a matter of course, a party may amend a pleading once at any time before a responsive pleading is served. If no responsive pleading is permitted and the case is not yet placed on a trial calendar, a party may amend it at any time within 30 days after the pleading is served. Otherwise, a party can amend a pleading only with leave of the Court or by written consent of the adverse party. Leave is granted freely when justice requires it, but the Court will evaluate the facts and circumstances of each case.

There must be an explanation of the reason for the amended petition, and the Court must evaluate whether the issues sought to be raised would require the consideration of "stale evidence." The additional burden on respondent and the Tax Court is also considered in this evaluation.

Note that a party cannot be allowed to amend a petition after expiration of the relevant filing time if the amendment grants jurisdiction on the Court over any matter that would not otherwise be conferred by the petition as filed. In *O'Neil* (66 TC 105 (1976)) the Court did not allow a petition to be amended to contest all of the years listed in the notice of deficiency attached to the petition when the original petition only mentioned some of those years.

When issues not raised in the pleadings are tried by express or implied consent of the parties, they are treated as if they were raised in the pleadings. The Court, upon motion of any party at any time, may permit the amendment as necessary so the pleadings conform to the evidence.

If a party objects to evidence on the ground it is not within the issues raised by the pleadings, the Court may receive the evidence and at any time allow the pleadings to be amended to conform to the proof. The Court will do so freely when justice so requires and the objecting party fails to satisfy the Court that the admission of the evidence will prejudice that party's position on the merits.

> Example: The Court allowed the IRS to amend its answer to correct an error in the notice of deficiency in *Huzzella* (TC Memo 2017-210 (10/23/17)). The petitioner received Form 1099-K for eBay.com sales reflecting $37,013 in third party network transactions, but the IRS improperly showed that "$24,056 had been shown on the tax return" when in fact none of it was reported.
>
> Example: The Court did not allow a petitioner to amend a petition 6 ½ years after filing to claim a research credit in *TBL Licensing LLC f.k.a. The Timberland Company and Subsidiaries (A Consolidated Group)*, (TC Memo 2022-17 (7/12/22). The issues were resolved by petitioner and respondent on 1/31/22; in March 2022 petitioner moved for leave to amend its petition to assert a claim for a research credit under §41. Whether justice requires granting a motion for leave to amend depends on the facts and circumstances, and no one factor is determinative. Petitioner failed to offer any explanation for its lengthy delay in raising its claim.

SUBSTITUTION OF PARTIES; CHANGE OR CORRECTION IN NAME (RULE 63)

If a petitioner dies, the Court, on its own or on motion of a party or the decedent's successor or representative, may order substitution of the proper parties. Similarly, if a party becomes incompetent the Court may order the party's representative to proceed with the case. The Court, on its own or on motion of a party, may order a change of or correction in the name or title of a party.

INTERVENTION (RULE 64)
In general, on timely motion, the Court must permit anyone to intervene who is given an unconditional right to intervene by a federal statute.

On timely motion, the Court may permit anyone to intervene who is given a conditional right to intervene by a federal statute, or has a stake in the outcome of the litigation before the Court that may not be adequately protected by the existing parties, if the Court determines in its discretion that permitting the intervention (i) may contribute to a more complete presentation of the legal issues to be decided and (ii) is in the interest of justice. There is also a provision to allow a Federal or state governmental officer or agency to intervene. In exercising its discretion, the Court must consider whether the intervention will unduly delay or prejudice the adjudication of the issues raised by the existing parties.

Notice to intervene must be served on the parties as provided in Rule 21 and comply with the requirements of Rule 50 and 54.

TAX COURT JURISDICTION

IN GENERAL (RULE 13)
This rule provides minimal information about Court jurisdiction; the Court's general grant of jurisdiction is found within the IRC and Tax Court rules. The Tax Court's core authority to redetermine a deficiency asserted by the IRS in income, gift or estate taxes arising from IRC §6213. The Tax Court can determine other controversies only if a pleading is timely filed and it specifically has jurisdiction in that area. Jurisdiction generally depends upon the IRS issuing a notice of deficiency (under §6212, assuming it is a deficiency case), and the taxpayer filing a timely petition.

Once the Court has jurisdiction over a matter it can find an overpayment or underpayment of tax for the year at issue, so it is possible a taxpayer may owe more than the amount shown on the notice of deficiency. The IRS bears the burden of proof on any new matters raised and any increases in the deficiency.

The Tax Relief Act of 1997 (TRA 97) effectively overruled the Supreme Court's ruling in *Lundy* (*Comm'r v Lundy*, 116 S Ct 647 (1996)). That case allowed the Tax Court to order refunds to taxpayers who filed their return after the IRS issued a notice of deficiency only of taxes that were paid two years prior to issuance of the deficiency notice. Now §6512(b) allows taxpayers who initially fail to file a return but who receive a notice of deficiency and file a petition in Tax Court during the third year after the return's due date to obtain a refund of excessive amounts paid within the 3-year period prior to the date of the deficiency notice.

The Court has jurisdiction to determine whether it has jurisdiction over a matter. Even if the petition is filed beyond the statutory period, a petition can be filed if a taxpayer believes the IRS failed to issue the notice of deficiency properly. The IRS will move to dismiss the late-filed

petition for lack of jurisdiction; in reply, the taxpayer files his or her own motion to dismiss based upon the notice of deficiency being invalid, offering relevant proof and citing case law. If the Court finds the notice was improperly issued, it grants the taxpayer's motion for dismissal. As a result, the assessment is invalid and must be abated. However, be aware that if the Court dismisses the case because of an invalid notice of deficiency, the IRS may simply be able to refile the notice of deficiency if time is open on the statute.

If the Court finds the notice was timely filed, it will grant the Commissioner's motion to dismiss, which leaves the presumptively correct assessment in place.

> Example: *Panagiota Pam Sotiropoulos* (TC Memo 2017-75 (5/1/17)) is a US citizen who lived and worked in the UK. For her 2003-2005 US returns she claimed foreign tax credits based on her UK income, but her UK returns for the relevant periods showed large overpayments. Petitioner applied to have the UK overpayments refunded to her, but did not notify the Secretary by filing amended returns (or otherwise). Her returns were examined and the IRS issued her a notice of deficiency that recomputed her foreign tax credits and determined an accuracy related penalty. After the case was docketed respondent moved to dismiss for lack of jurisdiction because the notice of deficiency should not have been issued and that instead, the respondent had rights to collect it upon notice and demand. The Court has jurisdiction to determine if it has jurisdiction and whether the UK taxes were refunded as discussed under the statute. That seems it should be a simple issue to decide, but it actually is a fairly lengthy discussion.

INCOME TAX DEFICIENCY

A deficiency in income tax includes:

- tax on accumulated earnings,
- personal holding company taxes,
- self-employment tax, **and**
- liability for withholding of tax on nonresident aliens and foreign corporations.

The Tax Court has the power to determine virtually any matter related to the taxable year before the Court once it has jurisdiction; if the IRS claims an increased deficiency, the IRS has the burden of proof on the new matter.

EXCISE TAX DEFICIENCY

Not all excise taxes require a notice of deficiency be filed to determine a deficiency, so not all excise taxes fall under Court jurisdiction. Some excise taxes that do include:

- tax imposed on certain public charities, private foundations (§4940), excess lobbying (§4911) and other tax-exempt organizations,
- funding deficiencies on qualified plans (§4971), **and**
- undistributed income imposed on REITS (§4981) and regulated investment companies.

ADDITIONS TO TAX

Under §6665 the IRS and Tax Court are required to treat penalties in the same manner as taxes due, so the Court also has jurisdiction over additions to tax that are related to jurisdictional taxes even if no tax is due (*Rice*, 77 TC Memo 1488 (1999)). 'Additions to tax' are defined to be civil tax penalties; they do not include interest imposed by §6601 on underpayments of tax.

These additions to tax include penalties shown on the notice of deficiency, such as late filing and/or late paying (under §§6651, 6665(b)), accuracy, and fraud penalties (under §§6662, 6663, 6665(a)) and the penalty for failure to pay estimated tax if no return is due (§§6654, 6655, 6665(b)(2)). However, in *Forgey Estate* (115 TC 11 (8/16/00)) the Court found it had no jurisdiction to consider §6651(a) penalty for late filing because a settlement eliminated the deficiency. In *Wilson* (118 TC 33 (6/12/02)) the Court dismissed a petition for lack of jurisdiction where the statutory notice included §6651(f) fraudulent failure to file and §6654 failure to pay estimated taxes but determined no income tax deficiency.

The IRS must meet the burden of production for additions to tax. In *Wheeler* (127 TC 14 (12/6/06)) the petitioner failed to file his 2003 return. Respondent had burden of production under §7491 to produce evidence petitioner did not file a tax return for 2003 and that no estimated tax payments were made but did not produce any evidence regarding the 2002 return (whether petitioner had filed the return or had any Federal income tax liability). Respondent also failed to introduce any evidence whether the IRS had prepared a substitute for return (SFR) under §6020(b). In order for §6651(a)(2) penalty to apply the respondent must introduce evidence the tax was shown on a return, or that the IRS prepared an SFR. IRS failed to do this. Further respondent failed the burden of production under §6654 penalty by not showing if 2002 return was filed that contained any tax liability.

There is no jurisdiction on other penalties (for example, preparer penalties or the Trust Fund Recovery Penalty - penalties are discussed in a later section of the text), unless they come in through collection due process (CDP) hearing jurisdiction. There also is no jurisdiction over increased interest only.

TRANSFEREE LIABILITY

Any person acquiring an interest in property from a tax debtor, who after the transfer cannot pay his tax debts, may be subject to transferee liability. Think of entities that transfer assets to partners, members or shareholders, or federal gift and estate tax liabilities.

IRC §6901 confers Tax Court jurisdiction on cases commenced by the issuance of a notice of liability as a transferee or fiduciary concerning income, estate, or gift taxes. If the deficiency procedures and Tax Court jurisdiction are available for the underlying tax, they also apply in the case of the transferee liability. In this action, the IRS imposes personal liability upon those in possession of the taxpayer's transferred assets (which could occur with the dissolution of a corporation or partnership). The Court has jurisdiction to review the Commissioner's

determinations set forth in a notice of transferee liability. The petition must be filed within 90 days of the date the notice of deficiency/liability was mailed.

> Example: Transferee liability applied in *Mary A Saigh, Transferee, Petitioner*, TC Memo 2005-20 (2/8/05). Petitioner received assets from her mother's federal estate ($4,000,000 value at the time of death). The co-executors of the estate failed to file Form 706 or make payments for estate taxes; as of June 2004 the estate tax liability was in excess of $8.2 million. The petitioner was held liable as transferee, trustee and beneficiary of the property of the estate and had to pay interest from the due date of the estate's tax return.

DECLARATORY JUDGMENTS (TAX COURT RULES 210-218)

Tax Court has jurisdiction to make a declaratory judgment in the case of actual controversy involving a determination by the IRS, or its failure to make a determination, on various issues. A notice of deficiency is not issued in these instances, so none is required to confer jurisdiction on the Tax Court. Jurisdiction is conferred instead when a Notice of Determination is issued, or when there is Failure to Issue Notice.

The Court's jurisdiction on declaratory judgments hinges on filing a timely petition either after an adverse action by the Commissioner, or a failure to act upon a request. The time limit to act upon an adverse determination is 90 days from the mailing date of the determination; if a determination is sought from the IRS and not acted upon, the waiting period is 270 days (180 for governmental obligation) before filing the petition.

There must be an actual controversy, and the taxpayer must exhaust all administrative remedies within the IRS before filing a petition. Tax Court declarations have the same effect as Tax Court decisions and can be appealed.

The Court has jurisdiction over the initial or continuing qualifications for tax-exempt status of tax-exempt organizations, retirement plans, private foundations and certain government obligations. The Court can determine the value of certain gifts disclosed on gift tax returns.

The Court is authorized under §7479 to provide declaratory judgments regarding initial or continuing eligibility for estate tax deferred under §6166. That code section allows an executor to elect a 10-year installment payment period when the value of an interest in a closely held business, included in determining a decedent's gross estate, exceeds 35% of the adjusted gross estate. The Tax Court's jurisdiction allows it to modify an estate tax decision it rendered when the taxpayer elected an extended payment period. The modification allows the interest actually paid by an estate to then be treated as an administrative expense deduction, which can result in the Court ordering a refund of estate taxes.

> Example: *Community Education Foundation* (TC Memo 2016-223 (12/12/16)) lost its exempt status under §501(c)(3). Petitioner filed a petition for a declaratory judgment to

decide whether petitioner operates exclusively for charitable purposes including holding town halls, educational forums for public officials and national workshops, according to its application for exempt status. Over time petitioner did not meaningfully organize or allocate resources to any of those activities and respondent sent a letter proposing to revoke the tax-exempt status. In the protest filed with Appeals, petitioner admitted it was inactive from 9/01-12/08 but that it tried, but failed, to host various events in 2009 and 2010. On 10/22/13, respondent issued an adverse determination effective 1/1/08. In a declaratory judgment action brought under §7428 the organization bears the burden of proving it is a §501(c)(3) organization. Petitioner did not engage in any activity that accomplished one or more of the exempt purposes.

DISCLOSURE ACTIONS (TAX COURT RULES 220-229A)

Any written determination (deemed to be a ruling, determination letter, technical advice memorandum, or Chief Counsel advice) and related background file documents are open to specific inspection after the IRS deletes specific identifying information and other information. After exhausting all available administrative remedies within the IRS, the taxpayer can petition the Tax Court to restrain disclosure or to obtain disclosure.

Restraining disclosure is to prevent part or all of a matter from being made public. Jurisdiction depends on IRS notice of intention to disclose information. A petition must be filed within 60 days after IRS mails notice of intention to disclose information.

Example: In *Anonymous* (134 TC 62 (01/19/10)) the petitioner asked the Court to remove information from an adverse Private Letter Ruling (PLR) before it was released publicly as it would tend to identify the petitioner. Petitioner was offered the chance to withdraw the PLR but declined. Petitioner asked that the Tax Court order the IRS not to disclose the PLR or order the respondent to delete certain terms from the PLR. Respondent argued that the Tax Court lacked jurisdiction to prevent the disclosure of the PLR at issue. The Court held that its jurisdiction is limited to determine whether certain terms in the PLR must be deleted before publication – it cannot order the Commissioner to restrain disclosure of a PLR in its entirety. Under §6110(a) the IRS is required to delete certain information that is exempt from disclosure, including names, addresses, and other identifying details of the person for whom the written determination pertains. §6103 protects the privacy of taxpayers and restricts government officers and employees from disclosing confidential return information but §6103(h)(1) explicitly permits disclosure to Department of Treasury officers and employees whose official duties require inspection or disclosure for tax administration purposes. Under §6110(f)(3) the Court has jurisdiction to determine whether, and to what extent, a disputed portion of a written determination or background file document may be open to public inspection.

To obtain disclosure of identity of person to whom written determination pertains, a petition must be filed within 36 months after the first date on which a written determination is made open.

Taxpayer may be entitled to reimbursement of reasonable administrative costs if the taxpayer prevails in an IRS administrative hearing and the IRS was not substantially justified, even if no Tax Court action was commenced. See the Award of Costs section later for more information.

A petition must be filed within 90 days after the date in which the IRS resolves tax and penalties and mails or furnishes closing documents, or after six months if the IRS fails to rule on an application.

CLAIMS FOR LITIGATION AND ADMINISTRATIVE COSTS (RULES 230-233)

Taxpayers who prevail in IRS administrative proceedings where the IRS position is not substantially justified can seek an award of reasonable litigation and administrative costs under §7430. If the award is denied, that action may be appealed to the Tax Court. See also Actions for Administrative Costs (Rules 270-274) for more details.

TEFRA PARTNERSHIP ACTIONS (RULES 240-251)

The Final Partnership Administrative Adjustment (FPAA) occurs at the entity level to redetermine partnership items and is binding on all partners who did not previously settle the issue or for a Notice Partner who opted out of proceedings.

Partnership items are those more properly decided at the partnership level. A partner's amount at risk is NOT a partnership item but is an affected item (one that is only partly determined by relevant partnership factors). Affected items apply to the individual partners and includes additions to tax (penalties) based upon partnership adjustments, and net operating loss carry backs from a year in which a partnership loss is claimed.

A notice of deficiency to a partner does not give the Tax Court jurisdiction to adjust partnership items that could be subject to FPAA proceedings. The FPAA does not given the Tax Court jurisdiction to decide any nonpartnership items. The Court only has jurisdiction over partnership items and affected items when the notice of deficiency is issued after completion of the related partnership proceeding (*GAF Corp* (114 TC 519 (2000)).

The Tax Relief Act of 1997 (TRA-97) added §6234 to the IRC. This section provides that if a notice of deficiency is issued to a partner all partnership income is assumed to be correctly reported on the taxpayer's return.

See the Partnership jurisdiction section for an enhanced discussion of the special rules relating to partnerships and Tax Court proceedings.

PARTNERSHIP ACTIONS UNDER BBA SECTION 1101 (RULES 255.1-255.7)
This section was added pursuant to the Bipartisan Budget Act of 2015 (BBA), which added §6234(a)(1) to the Code (section 1101(c)(1) refers to the BBA).

The Court does not have jurisdiction of a partnership action under this Title unless the following conditions are satisfied:

1) The Commissioner has mailed a final notice of partnership adjustment (FPAA) with respect to the partnership's taxable year
2) The partnership representative files a petition for readjustment with respect to the year within 90 days after the date on which the notice of FPAA is mailed.

If at the time of the commencement of the partnership action the partnership representative is not identified in the petition, then the Court will take such action as may be necessary to establish the identity of that representative.

After notice and an opportunity to be heard, (1) the Court may for cause remove a partnership representative for purposes of the partnership action, and (2) if the partnership representative's status is terminated for any reason, including removal by the Court, the partnership will then designate a successor partnership representative in accordance with the requirements of §6223.

A decision that the Court enters in a partnership action is binding on the partnership and on all of its partners.

REDETERMINATION OF S CORPORATION ITEMS
Effective 1/1/97, the Court no longer has jurisdiction over S corporations. The repeal of the TEFRA audit provisions to subchapter S corporate items means such items are now decided at the shareholder level. As such, these matters now arise as part of an examination of an individual's income tax return.

COLLATERAL JURISDICTION
The Court has collateral jurisdiction over some matters relating to cases pending before it. These include Motions to Restrain Premature Assessments and Motions for Review of Jeopardy Assessments and Levies (see the Motions section for more details on those actions).

Amounts Collected When IRS is Prohibited from Collection
The IRS is prohibited from taking assessment or collection acting during the period for filing a petition; if a petition is filed, this continues until the Tax Court renders a final decision. Also, the statute of limitations is tolled for the period of filing a petition (90 or 150 days, depending upon the circumstances) until 60 days after a decision by the Tax Court becomes final.

The Court can order refunds for amounts collected during the period in which the IRS is prohibited from collecting the deficiency through levy or Court proceeding, but only if a timely

redetermination petition is filed under §6213. Exceptions apply for terminations and jeopardy assessments under §6851 and §6861.

Overpayments (Rule 260)
A proceeding under this rule cannot be commenced before the expiration of 120 days after the decision of the Court determining the overpayment has become final within the meaning of §7481(a). The Commissioner must file a written response within 30 days after service of a motion filed pursuant to this Rule; the response must specifically admit or deny each allegation set forth in the petitioner's motion. This amendment is effective as of 10/6/20.

Redetermine Interest (Rule 261)
A proceeding to redetermine interest on a deficiency assessed under §6215 or to redetermine interest on an overpayment determined under §6512(b) is commenced by filing a motion with the Court. The proceeding must be commenced within 1 year after the date that the Court's decision became final within the meaning of §7481(a).

If the motion is to redetermine interest on a deficiency determined by the Court there must also be a statement that the petitioner has paid the entire amount of the deficiency plus interest claimed by the IRS.

The Commissioner must file a written response within 60 days after service of a motion filed pursuant to this Rule.

Modify Decision on §6166 Estate Election (Rule 262)
Motions to modify a decision in an estate tax case under §7481(d) are started by filing a motion and the proposed form of decision.

ACTIONS FOR ADMINISTRATIVE COSTS (RULE 270-274)
Taxpayers who prevail in Court have the right to recover a portion of the administrative and litigation costs incurred during Tax Court litigation, as well as costs associated with litigating the fee issue. When a Tax Court decision is appealed, §7430 also authorizes the appellate court to award taxpayer the litigation costs incurred in the appeal.

Costs must be incurred on or after the earlier of these dates:

- date taxpayer receives notice of the IRS Appeals decision,
- the date of the notice of deficiency, **or**
- the date on which the first letter of proposed deficiency that allows the taxpayer an opportunity for review by Appeals is sent.

Since most Appeals decisions result either in a concession or a notice of deficiency, there are few administrative costs that are compensated. Such costs may exist if the notice of deficiency is rescinded before the action proceeds to Tax Court. The taxpayer must apply for an award of administrative costs no later than 90 days after the date the IRS resolves tax and penalties and

provides the taxpayer with closing documents. If the claim is denied, or the IRS fails to rule on the application within six months, a petition can be filed within 90 days of notice of the IRS denial. Tax Court rules for this type of hearing are similar to the small tax case rules, except there is no $50,000 limitation.

Taxpayers may not recover fees for administrative proceedings that result in settlement prior to any decision by Appeals or issuance of the notice of deficiency. Until Appeals has acted, the U.S. has not taken a position. The Court can only award costs incurred for the proceeding before it, not for past proceedings even if they were on identical issues in *Grigoraci* (122 TC 272 (2004)).

A client cannot assign his §7430 award to his attorney. In *David Greenberg* (TC Opinion 147 No 13 (11/9/16)) the petitioner sought the §7430 award of costs (his attorney's fees) for an earlier administrative proceeding in which he represented a taxpayer (his client) before the IRS under a POA. His client's matter was resolved, but he was owned fees for his representation and the client agreed petitioner would receive any administrative fees awarded under §7430. Petitioner filed a claim on his client's behalf and on his own behalf. When he was not awarded the administrative costs by Appeals, he filed his petition. While §7430(f)(2) does not specify who may file a petition, §7430(a) limits awards of administrative costs to a 'prevailing party' who has exhausted all available administrative remedies and did not unreasonable protract the proceedings. Further, the administrative costs must be 'incurred' by the prevailing party (who has a legal obligation to pay them), not charged by the prevailing party. Petitioner was not a party to the underlying dispute so he cannot be a prevailing party and can't be the proper party to petition the Court for review of respondent's denial – the Court lacked jurisdiction to decide this case.

The government is not entitled to cost recovery per se, but there are provisions to penalize the taxpayer (see Award of Costs under §6673(a) section for more details).

Form 3 is the Petition for Administrative Costs
[https://ustaxcourt.gov/resources/forms/Petition_for_Administrative_Costs_Form_3.pdf]

Recovery of What Costs
Administrative costs relate to any proceeding or action before the IRS and can be awarded to taxpayers who prevail in proceedings that do not become court proceedings. Allowable costs are very restrictive and few are entitled to them.

Judicial or litigation costs relate to any civil action brought in a court of the United States and are more commonly awarded. These are court costs, including filing and transcript fees, expert witness expenses, costs of studies or analysis necessary to prepare the taxpayer's case, and attorney fees as statutorily permitted.

However, there is no means for one party to recover reasonable litigation costs from another party under §7430. In *Amarasinghe* (TC Memo 2007-333 (11/6/07)) the P-H (petitioner-husband) failed to pay child support and alimony to P-W (petitioner-wife); she received a court order that demanded he draw funds from a profit-sharing plan to honor the delinquent payments. P-W then sought to recover litigation costs from P-H and his new wife, which is not possible.

Section 7430 is the exclusive means for recovering attorney's fees in cases arising in connection with the determination, collection or refund of taxes. These awards of costs include $230 per hour for legal (or non-attorney court practitioners) fees incurred in 2023 (see Rev Proc 2022-38 which announces the inflation adjustments for 2023; the Court allows cost of living adjustments and the base allowable legal fees are $125 an hour) and reasonable litigation costs, including expert witness fees. Note that it is more important to understand that the legal fee amounts are statutory (except as provided below) and not to worry about an exact amount allowed at the time of the exam.

It is possible to receive a legal fee higher than the statutory amount if the taxpayer resides in an area where there are few qualified attorneys, or the tax issues require special expertise. But being only one of 3 board-certified federal tax attorneys in a region is not sufficient as a special finding in *Images in Motion of El Paso, Inc* (TC Memo 2006-19 (2/7/06)).

Attorney fees can be recovered when counsel represented a taxpayer pro bono if fees are paid to the representative or to their employer. No legal fees can be paid for self-representation, even when the taxpayer is also an attorney. Petitioners cannot recover the value of their own time or lost time for work, but they can recover actual costs for court filing fees, postage, parking and mileage in *Dunaway* (124 TC 7 (2005)). And one cannot recover for 'lost opportunities' as an attorney attempted for 1,000 hours at $350 an hour in *Nina Kazazian* TC Memo 2017-135 (7/10/17)).

Award of Costs Requirements

To win a recovery of costs/fees the taxpayer must:

- meet a net worth requirement when the original petition is filed. Net worth is equal to assets less liabilities (stated at historical cost) and must be less than $2 million for an individual, or $7 million for organizations, which must also have less than 500 employees. Organizations include unincorporated businesses, so self-employed taxpayers filing a Schedule C cannot exceed $7 million. Net worth limitations do not apply to §501(c)(3) organizations. Husbands and wives are treated separately, each subject to the $2,000,000 limitation. If one spouse has a net worth of more than $2,000,000 and the other spouse has a net worth of less than $2,000,000, only the spouse who meets this test can be the prevailing party,
- exhaust all administrative remedies within the IRS, including choosing an Appeals conference if one is offered prior to filing the petition,
- disclose all relevant information. The taxpayer is deemed to meet these requirements if

no 30-day letter is received prior to the statutory notice as long as the party's actions did not cause failure to receive notice, and party does not refuse a conference once the case is docketed,
- not unreasonably protract proceedings (for example, taxpayer cannot fail to follow a standing pretrial order), **and**
- be the prevailing party and must have substantially prevailed. The IRS position must not be substantially justified.

For cases filed after 7/30/96 (TBOR2 date) the IRS has the burden of proving that its position was substantially justified. A position is substantially justified if it has a reasonable basis in both law and fact. For a position to be substantially justified there must be substantial evidence to support it. The IRS is not substantially justified if it fails to follow its own published guidance, including regulations and revenue rulings. The Court must consider if the IRS prevailed in appellate courts or not. If the IRS carries that burden, the taxpayer cannot be the prevailing party and is ineligible for the award. The taxpayer either prevails by decision of the Court, an IRS concession, or a settlement of issues. The Commissioner's position is substantially justified if, on the basis of all the facts and circumstances and legal precedent, the Commissioner acted reasonably. It must be 'justified to a degree that could satisfy a reasonable person." Just because the IRS loses its position does not establish that the position was unreasonable. The

IRS can reasonably rely upon a revenue procedure until it is revoked or held invalid (*Vines*, TC Memo 2006-258 (11/30/06)).

'Substantially prevails' means the taxpayer either prevails on the amount in controversy or on the most significant issues (*Bragg,* 102 TC 715 (1994)). If the taxpayer does not provide all relevant information under his or her control, the IRS's position is substantially justified in *McKee* (TC Memo 2004-115 (2004)).

To win an award of costs, the taxpayer must substantially prevail, either in the most significant issue(s) or the amount, and the IRS must not be substantially justified in its position.

The IRS has the right to develop issues; just because the IRS loses doesn't mean its position was not substantially justified.

Taxpayer is not treated as a prevailing party if the US position was substantially justified. A position of the United States is one taken in an administrative proceeding, but not one that occurs before the Appeals office issuance a decision of a notice of deficiency. The Court found that the respondent had the right to develop and "was justified in developing a record regarding petitioner's relationship" with the mother and children, and to challenge the

authenticity of Forms 8332 in *Michael J St Claire* (TC Memo 2016-192 (10/19/16)), although some fees were allowed for litigating the fee issue.

A 30-day letter is not a decision of the US, and petitioners were not the prevailing party entitled to administrative costs in *Rathbun* (125 TC 2 (7/12/05)). In *Demetree* (TC Memo 2007-210 (8/1/07)) the taxpayer prevailed in establishing that unreported deposits were actually gifts and loans, but the IRS's position that the deposits were income was substantially justified and reasonable. Simply because the IRS loses its case does not mean the position was not justified.

The Appeals conference must be requested even if the taxpayer believes it is an exercise in futility (*Grace Lilly v IRS*, 76 F.3d 568 (4th Circ. 1995)). Petitioner that requested an Appeals conference that was denied (because the IRS did not believe it met the formal requirements of a written protest) was considered to exhaust all administrative remedies in *Images in Motion of El Paso, Inc* (TC Memo 2006-19 (2/7/06)). However, taxpayer who did not request an Appeals conference because there is not sufficient time to do so (the statute of limitations was about to expire for assessment and Appeals would not consider the case) did not exhaust all administrative remedies in *Haas & Associates Accountancy Corporation*, (117 TC 5 (8/10/01)).

In *Covert* (TC Memo 2008-90 (4/8/08)) the petitioner and counsel decided to forgo the Appeals hearing, because it was apparent the Appeals officer was not going to rule their way, and petition the Tax Court after the deficiency notice was received. The sole issue for each year was whether petitioner was engaged in ranching for profit under §183. Petitioner engaged new counsel before the trial. Respondent conceded all issues in the deficiency notice and the petitioner sought to recover $223,000 in litigation costs, making this a very expensive lesson to learn that an Appeals conference is part of the requirement for an award of costs.

When to Request an Award of Costs

In an agreed case, an award of reasonable litigation and administrative costs may be included in the stipulated decision submitted by the parties for entry by the Court.

If the case is unagreed, a claim is made by filing a motion within 30 days after service of a written opinion that determines the issues in the case, or within 30 days after service of the pages of the transcript that contain findings of fact or opinion under Rule 152, or after the parties settle all issues in the case other than the litigation and administrative costs. The claim for fees must include an affidavit that states all costs paid or incurred and 'distinctly' sets forth the nature and amount of each item of costs for which an award is claimed. The IRS has 60 days in which to file its Answer. The taxpayer and the IRS must have a conference to resolve this dispute before going to the Court for assistance.

It is inappropriate to request an award of costs and fees when the petition related to a deficiency is originally filed, and now Rule 34 specifically states that. Under §7429(b)(2)(B) Tax Court proceedings relating to jeopardy assessments raise issues separate from a deficiency

case; it is appropriate to request the Court deal with those litigation fees and costs before a decision is made in the deficiency case.

Qualified Offers
Qualified offers can be made under §7430(g). The taxpayer can be treated as a prevailing party if she or he made a qualified offer that was not accepted by the IRS, and subsequently obtains a judgment in which the tax liability determined by the Court is less than the qualified offer. The qualified offer must be in writing, be made during a qualified offer period, specify the amount of tax liability, state it is a qualified offer, and remain open from the date made to the earliest of 1) date offer is rejected, 2) the date the trial begins, or 3) 90 days after the offer was made. Once a qualified offer is accepted it is a contract and cannot be revised unilaterally by the taxpayer (*Johnston* (122 TC 124 (2004)).

A qualified offer can't reserve the right to claim relief from liability under §6015. In *Gina Lewis* (159 TC 3 (3/3/22) petitioner made what purported to be a qualified offer but reserved the right to claim relief under §6015. After reaching settlement with the intervenor, respondent conceded petitioner was entitled to §6015(c) relief and petitioner moved for litigation costs recovery. A qualified offer must be an "amount, the acceptance of which by the United States will fully resolve the taxpayer's liability", and this offer wouldn't fully resolve that liability.

MEMORY TOOL – NAP PJ + LIST + PRAYER
Requirements for §7430 Award of Costs:

N – **net** worth requirements met
A – all **administrative** remedies exhausted
P – not unreasonably **protract** proceedings

P – substantially **prevails**
J – IRS not substantially **justified**

Detailed **LIST** of all costs
PRAYER for relief (note that this does not appear in prior full point exam answers, but it is a required element of an award of costs motion).

IRS REFUSAL TO ABATE INTEREST (RULE 280-284)
The Court has jurisdiction over the abatement of interest due to an error or delay by an IRS official performing a ministerial or managerial act. This requires either 1) a Notice of Final Determination not to abate interest under §6404, and a petition for review filed with Tax Court within 180 days after the IRS rules on the abatement request, or 2) a failure of the IRS to issue a final determination on a claim within 180 days after the claim was filed. The taxpayer must meet net worth and size requirements (discussed in a later section) and must also prove that the IRS's failure to abate the interest was an abuse of discretion: in other words, in denying the request does the IRS act arbitrarily, capriciously or without sound basis in fact or law? Awards

based on these rules are seldom granted and it is rare the petitioner can prove an abuse of discretion occurred.

The IRS may abate interest on 1) a deficiency attributable to an unreasonable error or delay by an IRS official performing a ministerial or managerial act or 2) a payment of tax to extend the error/delay in paying the tax is attributable to IRS official being erroneous or dilatory in performing a managerial or ministerial act. In deciding whether to grant relief, the taxpayer cannot contribute to the error or delay in any significant way.

A **ministerial** act is a procedural or mechanical act that does not involve the exercise of judgment or discretion and that occurs during the processing of a taxpayer's case after all prerequisites have taken place.

A **managerial** act is an administrative act that occurs during the processing of a taxpayer's case involving the temporary or permanent loss of records or the exercise of judgment or discretion relating to management of personnel.

A decision concerning the proper application of federal tax law is not a ministerial or a managerial act.

Jurisdiction for §6404 abatement of interest requires that the petition be filed within 180 days after an adverse notice of determination, or when the IRS fails to act within 180 days of an abatement request. Abuse of discretion is the standard used to evaluate these cases.

Under §6404(e)(1) there is no authority for the IRS to abate interest on employment taxes. In *Miller* (310 F.3d 640 (9th Circuit, 2002)), the IRS's interpretation that there is no statutory authority to abate interest on employment taxes was not found to be an abuse of discretion.

> Example: *Victor Lesende and Sara Lesende* (TC Memo 2016-178 (9/26/16)) had an audit of tax years 2009 and 2010 that started with the appointment letter being sent on 11/3/11. The case was closed to a notice of deficiency on 4/17/12 and a petition was filed 6/8/12. Appeals acknowledged the case on 9/4/12 and on 10/26/12 case processing was disrupted by Hurricane Sandy (the case was being handled in NJ). A decision was entered by the Tax Court on 4/10/13 and the tax and interest were assessed on 5/20/13. Petitioners sent a request for abatement of interest on 6/17/13, and respondent denied that claim on 1/9/14.
>
> §6404(e) permits the Commission to abate interest with respect to an unreasonable error or delay of the IRS resulting from a ministerial act or a managerial act. Petitioners argue that transferring the case from one office to another delayed the case by a month but they do not explain why the transfer caused an unreasonable error or delay. They

argue that the IRS employees gave them "a hard time" (and then one manager failed to discipline the examiner for giving the petitioner a hard time) but do not explain why that led to an unreasonable delay. They argue that the loss of one document, which had to be requested again, gave rise to an unreasonable error or delay. Petitioners were not able to establish that their facts fit the code to the Court upheld appeals' decision not to abate.

REDETERMINATION OF EMPLOYMENT STATUS (RULE 290-294)

Under amendments to §7436(a), the Court has jurisdiction to determine the proper amount of employment tax, additions to tax, and penalties relating to employment tax arising from worker classification or Revenue Act of 1978 §530 safe harbor determinations. Tax Court jurisdiction in this area was added with TRA 97; it requires an actual controversy that one or more taxpayer's workers are employees and that the taxpayer is not entitled to relief under §530 safe harbors.

Jurisdiction over employment status requires an actual controversy that one or more of the taxpayer's workers are employees, and that taxpayer is not entitled to relief under the safe harbors. The employer brings the action, not the worker. The Tax Court can also determine the amount of related employment taxes.

In deciding whether a taxpayer is to be treated as an independent contractor or as an employee, the Court applies 7 factors including: 1) control over manner of accomplishing work, 2) investment in work facilities and tools, 3) opportunity for profit or loss, 4) termination of the work relationship, 5) participation in service integral to regular business, 6) length of the relationship, and 7) intent of the parties as to the type of relationship formed (*Byers,* TC Memo 2007-331 (11/5/07)). See *Colorado Mufflers Unlimited* (TCM 2007-222 (8/13/07)) beginning on page 14 for a discussion of the 7 factors considered. Here the taxpayer filed Forms 940/941/W-2 for employees prior to 2001, but in that year took the position it no longer had employees and requested refund for taxes paid for 1997 and 1998. The taxpayer refused to cooperate with the IRS's examination, and used bank accounts in other names to hide the cash payments made to the workers.

The petition can only be filed by the person for whom the services were performed and must be filed before the 91st day (within 90 days, in other words) after the IRS mails its notice of determination. There is also a small case procedure if the tax is less than $50,000 for each calendar quarter. As with other small tax cases (discussed at greater length in another section), the decision cannot be appealed and has no precedential value. If the taxpayer prevails, §7430 attorney's fees/costs can be awarded.

The Tax Court held that it has jurisdiction to review an IRS determination that the Voluntary Classification Settlement Program (VCSP) does not apply to the computation of a corporation's

employment tax liability. The Court also denied the corporation's motion for summary judgment on the issue of whether its liability for employment tax and related penalties should be determined under the VCSP since a genuine dispute of material fact existed as to whether the misclassification of the sole corporate officer was uncovered as a result of an employment tax audit, thus making the corporation ineligible to participate in the VCSP. *Treece Financial Services Group v. Comm'r*, 158 TC 6 (2022); *Treece Investment Advisory Corp. v. Comm'r*, T.C. Memo 2022-38.

Remember that the Court does not have a general grant of jurisdiction applying to employment tax issues, only those related to the issue of worker classification.

LARGE PARTNERSHIP ACTIONS (RULES 300-305)

The Taxpayer Relief Act of 1997 created new provisions for electing large partnerships under §§771-777. Now partnerships with 100 or more members may elect large partnership status. This permits them to net nearly all reporting items to the partner instead of separately stating partnership items. The large partnership cannot be a service partnership or commodity pool; special rules apply to oil and gas partnerships and to those with residual interest in real estate mortgage investment conduits. To qualify as a large partnership, all K-1 forms must be filed by 3/15, even if taxpayer files for an extension of time to file Form 1065-B.

Tax credits are reported as a single item, except for the low-income housing credit, the rehabilitation credit, and the nonconventional fuel credit. Capital gains and losses are netted at the partnership level. Passive activity items are separated from capital gains from partnership portfolio income.

For large partnerships, any penalties imposed by the IRS are determined at the partnership, rather than the individual partner level.

A petition may be filed with the Tax Court, the U.S. District Court for the district in which the partnership's principal place of business is located, or the Federal Claims Court. Jurisdiction to determine the tax treatment of ALL partnership items for the tax year in which the notice of adjustment relates, including any penalty, addition to tax, or additional amount the partnership is liable for rests with the Court where the petition is filed.

For large partnership actions, which can be an 'action for readjustment of partnership items of a large partnership' under Code §6247 or an 'action for adjustment of partnership items of a large partnership' under §6252, jurisdiction in the Tax Court is accorded only to the large partnership. Individual partners have no standing to bring petitions or other actions for judicial review.

In an 'action for readjustment' the Commissioner must first issue a notice of partnership adjustment under §6245(b). This must be mailed to the partnership's last known address and is valid even if the partnership has since terminated its existence. A petition for readjustment

must be filed by the partnership within 90 days of the date on which the notice of partnership adjustment is mailed to the partnership. Under §6247(a) the partnership may file a petition with the Tax Court, the district court of the United States, or the Claims court.

In an 'action for adjustment' the Commissioner has not allowed some or all of the adjustment requested in an administrative adjustment request under §6252(a). The partnership may file a petition for adjustment to those partnership items with the Tax Court, the district court of the United States, or the Claims court. The petition can be filed after the expiration of 6 months from the date of filing of the §6251 request for an administrative adjustment of partnership items and before the date which is 2 years after the date of such request.

The partnership must designate a person to handle tax matters, but that person need not be a partner in the electing large partnership (§6255(b)(1)).

DECLARATORY JUDGMENT … OVERSHELTERED RETURN (RULES 310-316)

An oversheltered return is one that shows no taxable income for the taxable year and shows a net loss from partnership items. The Tax Court has jurisdiction for declaratory judgments when the Commissioner has issued a notice of adjustment, and the partnership files a timely petition (within the 90/150-day time frame after notice of adjustment is mailed to the taxpayer).

DETERMINATION … JOINT/SEVERAL LIABILITY (RULES 320-325)

For partnership issues, Tax Court jurisdiction was added with TRA 97, which permits the partner spouse to request an assessment be abated within 60 days of the date the IRS mails notice of computational adjustment.

The 1998 IRS Restructuring Act expanded innocent spouse relief under §6015, making this status easier to obtain than it had been under §6013. To the extent a spouse is found to be innocent, he or she is relieved of tax, interest and penalties. The innocent spouse still remains liable for any taxes, interest and penalties that do not qualify for relief.

Under §6015(e) the Court has jurisdiction to review a denial of, or a failure to rule on a request for relief from joint and several liability. Jurisdiction for the denial or failure by the IRS to rule on an application for relief and to order credits or refunds was granted in legislation enacted 7/22/98 for liabilities existing on or before that date that remained unpaid at that date. The petition must be filed within 90 days of the date beginning when IRS mails by certified or registered mail a notice denying relief. Taxpayer can file any time after the date which is 6 months after the date that the taxpayer filed the election with IRS and before close of the 90-day period.

Joint and several liability can be used as an affirmative defense §6213 to redetermine a deficiency, under collection due process actions under §6320(c) or §6330(d), or to dispute a petition under §6404 for the denial of the IRS to abate interest.

The actual requirements for §6015 relief will be discussed here briefly, and again in the Federal Taxation text. Relief is available under §6015(b), (c) or (f).

Jurisdiction for §6015 relief from joint and several liability requires that a petition be filed within 90 days after an adverse notice of determination, or after the IRS fails to act within 6 months of when Form 8857 is filed. The de novo standard applies, based on the administrative record established at the time of the determination and any newly discovered or previously unavailable evidence.

Innocent Spouse (§6015(b))

An innocent spouse request under (b) can generate a refund. The requirements include:

- a joint return was filed for the tax year in question,
- there is an understatement of tax attributable to an erroneous item by the other spouse,
- the taxpayer signed return but did not know, or have reason to know of the understatement,
- under the facts and circumstances, it is inequitable to hold the taxpayer liable for a deficiency attributable to erroneous item by the other spouse, **and**
- taxpayer elects the status on Form 8857 no later than 2 years after the date the IRS began collection activities on the taxpayer.

  Example: *Jennifer Soler* (TC Memo 2022-78 (7/18/22) requested relief for tax years 2012-2015. She is married to, and resides with, her husband. She's the primary income earner with a 2-year associate's degree in fashion design. He has a bachelor's degree in accounting and was primarily a stay-at-home father during those years who operated a couple of businesses. The returns were signed by both spouses. Neither spouse disputed the notices of deficiency issued for the various tax years. She filed Form 8857 in 2018 claiming she was unaware of any income tax liabilities until the IRS started to levy her wages. The parties don't dispute that she lacked actual knowledge of the items attributable to the nonrequesting spouse as she didn't know details of his businesses and didn't participate in them. But did she have reason to know? The Tax Court evaluated all facts and circumstances, including her level of education, the involvement in the family's business and financial affairs, the presence of unusual or lavish expenses compared with the family's past income level and expenditures and the nonrequesting spouse's level of evasiveness or deceit about the family's finances. Generally, when you signa return, you are charged with constructive knowledge of the contents.

  She knew her income alone wasn't enough to pay all the family's routine expenses; she is college educated and the primary income earner who was regularly involved in the household finances.

Example: *Brenda Taft* (TC Memo 2017-66 (4/18/17)) is a registered nurse who was married since 1981. Her husband liquidated his $200,000 stock to fund an extramarital affair; he tried to keep both things secret, even asking that their joint return be electronically filed without petitioner's approval or review. The stock sale was reported on the 2010 return, but the husband missed reporting nearly $5,000 in taxable dividends, which brought the IRS into the issue. Petitioner discovered the affair and filed for divorce, only learning then that the retirement savings and stock had been wasted or liquidated. After she filed her 2012 return, the respondent credited part of her $5,000 refund to the joint 2010 liability. Petitioner filed Form 8857 requesting to be relieved from the liability related to the unreported dividends and that respondent refund her money that was credited to that liability. Respondent granted her relief under §6015(c), but that provision does not provide for refunds, so she was not entitled to one.

Petitioner argued that she should have been granted relief under §6015(b), which does allow for refunds under these circumstances. Under (b) taxpayers will be relieved of liability for the understatement if a) a joint return is filed, 2) there is an understatement of tax attributable to the erroneous items of the nonrequesting spouse, c) the requesting spouse when signing the return did not know, and had no reason to know, there was such an understatement, d) taking into account all the facts and circumstances, it is inequitable to hold the requesting spouse liable, e) the requesting spouse elects this within 2 years after the date the Commissioner begins collection actions with respect to the requesting spouse. These are conjunctive – in other words, failure to satisfy any one of the elements precludes relief. Respondent argued she did not meet (c) and (d). The Court found she was entitled to relief under §6015(b)(1) and a refund.

Election of Separate Liability (§6015(c))

A request for election of separate liability under (c) cannot generate a refund of taxes, but can allocate the appropriate tax, interest and penalties between the spouses. The requirements are:

- a joint return was filed for the tax year in question,
- there is an understatement of tax attributable to an erroneous item by the other spouse, **and**
- the taxpayer at the time of the election is not married, is widowed, is legally separated from, or has lived apart for more than 12 months from the person with whom the taxpayer filed the original joint return.

Even if the IRS establishes the electing spouse had knowledge, he or she still qualifies for relief if the electing taxpayer was unaware of the extent of the understatement. The electing spouse remains liable only for the amount known.

Example: Husband prepares a joint income tax return with full access to Wife's financial records. Husband was still granted separation of liability because he relied on summarized information prepared by Wife; all of the taxes related to Wife's business were allocable only to her. (*Fredie Lynn Charlton v Comm'r* (TC Memo 2001-76 (3/27/01)).

This election does not work if the IRS demonstrates assets were transferred as part of fraudulent scheme, or if both taxpayers had actual knowledge of the understatement. The election also does not apply to returns jointly filed showing a liability at time of filing; in other words, the liability must arise from events that transpire after the original filing of the income tax return in question and not just because there was an amount due on the return.
The electing spouse has the burden of proof. The IRS must serve notice of the elected spouse's filing to the non-electing spouse, and the non-electing spouse can participate fully in an administrative IRS proceeding to establish separate liability. *Corson* (114 TC 24) confirmed that the Tax Court can establish rules that provide the non-electing joint filing spouse with adequate notice and the opportunity to become a party to the proceeding. A non-electing spouse is also called an intervenor.

Equitable Relief (§6015(f))
Equitable relief can be granted even if a taxpayer does not meet the rules above if under the facts and circumstances it is simply unfair to hold taxpayer liable for any unpaid tax or deficiency.

There is no 2-year requirement on equitable relief claims per se, but now there is a time limit for a taxpayer to request §6015(f) equitable relief. If the tax is unpaid, then the taxpayer must submit it prior to expiration of the Collection Statute of Limitations (CSOL). If the tax is paid, then the taxpayer must submit it prior to expiration of the Refund Statute of Limitations (RSOL).

The requesting spouse must satisfy all of the following:

- a joint return was filed with either an understatement or underpayment of tax,
- relief is not available under either innocent spouse or separation of liability provisions of the code,
- liability remains unpaid, except for:
    - refund claim amounts paid between 7/22/98-4/15/99
    - installment payments after 7/22/98, in an un-defaulted agreement,
- no fraudulent transfer of assets can occur,
- no disqualified assets were transferred to requesting spouse (if some were, relief is only available for the amount of liability that exceeds the fair market value of the transferred assets), **and**
- no fraudulent intent existed when the original return was filed.

Equitable relief usually is granted:

- if the requesting spouse no longer married (as defined above), **or**

- had no knowledge that the tax would not be paid when return was signed because it was reasonable to believe other spouse would pay, **and**
- if the requesting spouse will suffer economic hardship.

Other factors in **favor** of relief:

- abuse existed in the relationship, even if the abuse does not meet the legal standards of duress,
- the non-requesting spouse has a legal obligation to pay, **or**
- the liability is attributable to the non-requesting spouse.

Factors **against** relief:

- the liability is attributable to the requesting spouse,
- the requesting spouse had knowledge,
- the requesting spouse received a significant benefit (beyond support) from unpaid liability,
- there is no economic hardship to the requesting spouse,
- requesting spouse has been noncompliant with Federal income tax laws since then, **or**
- it is the requesting spouse's legal obligation to pay the amount due.

When innocent spouse relief is requested for the first time as an affirmative defense in the petition, Chief Counsel attorneys retain their discretion to adopt or reject determinations made by the Cincinnati Centralized Innocent Spouse Operation (CCISO), in *Michelle DelPonte* (158 TC 7 (5/5/22).

§6015 relief is not available for trust fund recovery penalties since they do not arise from joint federal income tax liabilities, in *Angela Chavis* (158 TC 8 (6/15/22). Petitioner was unable to challenge the underlying liabilities in a CDP because Letter 1153 gave her the prior opportunity to challenge them.

Nothing in §6015(e) prohibits the Commissioner from issuing more than one final determination to any given year; when the Commissioner issues a notice, the Tax Court can determine the validity and scope of that notice. In *Nilda Vera* (157 TC 6 (8/23/21) petitioner filed an untimely petition, by one day, for §6015 review on 2013 that respondent denied. Later she submitted a request for both 2010 and 2013; respondent filed a motion to dismiss the 2013 year, but issued a final determination unambiguously denying relief as to both years. The Tax Court found it had jurisdiction over both years.

If return is adjusted to reflect understatement of tax, relief is available only to extent of liability that existed on the return prior to the adjustment.

> Example: *Lisa Wilson* TC Memo 2017-63 (4/17/17) the petitioner married her spouse on 3/1/13. She died 7/5/13, leaving her as executor and sole beneficiary under her will. Spouse worked for Boys & Girls Club, earning wages of $18,661 and received

unemployment compensation of $5,245 – petitioner earned more than $81,000 in wages plus and nonemployee compensation of more than $5,500. Petitioner and her spouse were eligible to file a joint Federal return for taxable year 2013, but on 1/26/14 petitioner timely filed Form 1040A as a surviving spouse. The 2013 return reported adjusted gross income of $100,295 and claimed personal exemptions for petitioner, her spouse, and their children. Petitioner failed to report petitioner's spouse's unemployment compensation and petitioner's nonemployee compensation. On 1/13/16 petitioner submitted Form 8857, requesting relief from liability of the portion of deficiency attributable to her spouse's unemployment compensation. She admitted knowing about the unemployment compensation but was unaware there was no withholding against those funds by her spouse. She had actual knowledge of the item so was not eligible for relief under §6015 (b) or (c), and the Court found there was no economic hardship under (f) due to her income.

Under §6015(f) economic hardship generally exists when collection of the tax liability will render the taxpayer unable to meet basic living expenses. Petitioner was making more than $100,000 and her expense were not all considered reasonable basic monthly living expenses. Economic hardship does not exist if the requesting spouse's income exceeds 250% of the Federal poverty guidelines and monthly income exceeds reasonable basic monthly expenses by $300. She was not granted relief.

TAXPAYER FIRST ACT

1. The Tax Court will review innocent spouse cases de novo based on the administrative record established at the time of the determination and any additional newly discovered or previously unavailable evidence.

2. There is a time limit for a taxpayer to request §6015(f) equitable relief. If the tax is unpaid, then the taxpayer must submit it prior to expiration of the Collection Statute of Limitations (CSOL). If the tax is paid, then the taxpayer must submit it prior to expiration of the Refund Statute of Limitations (RSOL).

In *Sidney Ann Chaney Thomas*, (Corrected 160 TC 4 (2/13/23), petitioner tried to block respondent's introduction of posts from her personal blog that dealt with her lifestyle, assets, business and relationship with her husband. They were not part of the administrative record, and respondent learned of them after petitioner filed her petition to review the adverse notice of determination in a §6015 case. The Tax Court ruled that the ordinary meaning of "newly discovered" was "recently obtained sight or knowledge of for the first time." Respondent found the posts by searching the internet after she filed her petition, and the blog posts are admissible because they are "newly discovered … evidence."

Requirements Illustrated

Joint return

There is no innocent spouse relief possible if there is no joint return; while not statutory under §6015(f) it is clear from the legislative history that Congress intended a joint return requirement. "Not married" includes legal separation, divorce or being a widow/widower. In *Ohrman* (TC Memo 2003-301 (10/29/01)) the couple separated to avoid tax. Because that legal separation was motivated by tax-avoidance reasons, assets transferred as part of the separation agreement were deemed "disqualified assets." She could not avoid payment of tax because the value of disqualified assets received far exceeded the tax liability at issue and was ineligible for innocent spouse relief.

Spouse Did Not Know About the Understatement

One of the requirements in separation of liability is that the requesting spouse is not entitled to relief to the extent they had knowledge about the erroneous item. Under the old innocent spouse rules the standard was what the taxpayer knew or should have known. In *Culver* (116 TC 15 (4/2/01)) the Court found that the IRS had to prove that the electing spouse had actual knowledge of the item that gave rise to the deficiency, and that burden had to be met by a preponderance of the evidence. The burden is not met by what a "reasonably prudent person would be expected to know."

The spouse had knowledge if she was a partner in the partnership that created the understated item in *Bartak* (TC Memo 2004-83 (3/23/04)). The spouse also had knowledge when she knew her husband had a pattern of not paying the tax liabilities on their joint returns and that she had risk of being called on to pay the liabilities (*Ogonoski* TC Memo 2004-52 (3/8/04)).

In *Barranco* (TC Memo 2003-18)) the taxpayer was deemed to have constructive knowledge of her spouse's understated medical practice income even though she did not review the returns before signing them. She should have known the family's "substantial" personal expenditures were financed by the omitted income because the discrepancy between the reported income and the family's ever-improving lifestyle was so pronounced that she was reasonably on notice to make further inquiry.

Signing the return was not sufficient to establish actual or constructive knowledge that the tax due would not be paid in *Wiest* (TC Memo 2003-91 (3/27/03)).

Not Married, Widowed, Legally Separated From or Lived Apart

In *Alt* (119 TC 19 (12/17/02)) the Court found she did not qualify because she lived with her husband. When the Court looked at each element of relief under §6015, taxpayer failed §6015(b) because it would not be inequitable to hold her liable (she received substantial benefits from the underreported income and there was no concealment of the income). She failed §6015(c) since the Alts remained members of the same household and had been together the 12 months prior to filing the petition. She further failed the equitable provisions under §6015(f) as the Court determined it was fair to hold her responsible.

Taxpayer was entitled to innocent spouse equitable relief in *Rosenthal* (TC Memo 2004-89 (3/26/04)) when she discovered following her husband's death that he failed to report a taxable distribution. She filed an amended return and paid the additional tax, then filed for innocent spouse relief under all 3 provisions possible in §6015. Her status as a widow was considered "tantamount to her being separated or divorced."

Stand Alone Proceeding

The Court considers a filing under §6015(e) to be a "stand alone" proceeding that is not dependent upon any deficiencies. In *Corson* 114 TC 354 (2000) and *King* 115 TC 118 (2001) the Court ruled that relief for innocent spouses in a §6015(e) 'stand-alone' petition does not incorporate preassessment procedures, and thus it did not matter if the underlying assessment of the tax was barred by the statute of limitations.

Intervenor

The non-requesting spouse has the right to intervene in the Tax Court proceeding and is called the intervenor. The intervenor has the right to support (*Van Arsalen*, 123 TC 7 (7/22/04)) or contest the requesting spouse's claim. The nonrequesting spouse has no opportunity for judicial review that grants relief to his former spouse (*John Maier III*, 119 TC 16 (11/20/02)). Also, the right to intervene survives death, and respondent is obliged to try appropriate means to notify any heirs, executors or administrators (*Fain*, 129 TC 11 (10/2/07)).

Bankruptcy filing creates an automatic stay in the Tax Court "concerning the debtor" but does not stop a Tax Court case for the intervenor. In *Kovitch* (128 TC 9 (4/4/07)) the intervenor filed for bankruptcy shortly after filing a notice of intervention with the Tax Court. Whether the petitioner was entitled to relief could still be decided because the intervenor would remain responsible for the tax liability regardless of whether or not the petitioner remained jointly liable.

Rule 13(e) is amended on an interim basis to reflect changes in law to provide that the period for filing a petition for a claim for spousal relief or a petition for review of a lien or levy action is suspended during the period that a bankruptcy filing under Title 11 of the US Code prevents a taxpayer from petitioning the Tax Court and for 60 days thereafter. The PATH Act change applies to petitions filed under §6015(e) or §6330 after 12/18/15.

When Can the Petition be Filed?

For jurisdiction to apply a valid §6015 petition must be filed within 90 days of the denial of relief. This is confirmed in *Barnes* (130 TC 14 (6/11/08)) where the petitioner was denied requested relief in 2001. In 2007 she filed a second request for equitable relief on the same underpayment but provided more detailed factual allegations. After the IRS failed to reconsider its original denial of relief a petition was filed. The Court lacked jurisdiction because she failed to petition the Court within 90 days on the 2001 denial of relief – her second attempt was not a qualifying request for relief.

A petitioner cannot file for §6015 while there is an ongoing partnership proceeding in another Court. In *Adkison* (129 TC 13 (10/16/07)) the taxpayer deducted losses in connection with a tax shelter partnership on the 1999 tax return and filed for §6015 relief of some of the more than $5,000,000 the IRS determined is due. Until the underlying partnership level proceeding is final (with a notice of computational adjustment), it is premature for him to file for innocent spouse relief.

What Standard Applies?
§6015 determinations are tried based on the administrative record, and any newly discovered evidence, or evidence that was not previously available.

Equitable Relief Factors
What are the factors that determine whether a taxpayer qualifies for equitable relief? In *Hopkins* (121 TC 72, No 5 (7/29/03)) at first view it appears that taxpayer easily meets the criteria. She was born in Germany, had only a 9th grade education, never took any tax or business classes, and English is not her native language. Although on the face of the matter she appeared to fit the innocent spouse mold (she is not well educated, for example) subsequent events indicated that she understood the general concepts of federal income taxation. She was involved in the audit process and was actively involved in a prior Tax Court litigation concerning the disallowance of the NOLs related to the casualty loss. She was not entitled to relief under any provision of §6015. In a previous ruling, *Hopkins (*120 TC 17 (6/30/03)) was able to proceed with her innocent spouse case even though she had signed a closing agreement. That agreement was signed in 1988, thus she never was afforded the opportunity to request relief under §6015 since that law was not enacted until 1998.

Deficiency
The Court found that the tax reported on amended returns was treated as the amount reported on an original return, so there was no deficiency for the years in which taxpayer sought relief in *Demirjian* (TC Memo 2004-22 (1/30/04)).

Community Property
Some of the payments made by petitioner to the IRS in a community property state reflected separate funds and some were from community property in *Ordlock* (126 TC 4 ((1/19/06). Petitioner sought refunds of the amounts from her separate funds (undisputed by the IRS) and from the community funds under §6015. She was denied a refund from community funds.

Participate Meaningfully
The Tax Court looks at the totality of the facts and circumstances to determine if the participation was meaningful. In *Harbin* (137 TC 7 (9/26/11)) the petitioner filed for §6015 relief on his former wife's gambling activities. The petitioner and intervenor were represented by the same counsel during the prior deficiency case and executed a stipulated decision that they owed deficiencies and neither of them requested relief under §6015. The same attorney represented them during a contentious divorce until the divorce was final. The financial

interests and allocation of liability interests were adverse and the joint representation created a conflict of interest – the conflict was not explained to petitioner and no waiver was requested. The attorney even filed the §6015(b) denial of relief petition and withdrew only when respondent advised him of the conflict. The Court found he did not meaningfully participate in the deficiency case.

In *Susan Kechijian*, TC Memo 2022-127 (12/28/22), petitioner and her husband were parties to a previous deficiency case for 2000-2004. They jointly petitioned for redetermination of the deficiency, but H died before the case was decided. His estate was substituted as a party to the deficiency case; the Tax Court found a deficiency for 2004. Petitioner then filed Form 8857 requesting relief; respondent denied the claim. Petitioner argued that innocent spouse wasn't an issue in the prior case, and she didn't participate meaningfully in the previous case, so res judicata didn't apply. There is an exception in §6015(g)(2) where the spouse who did not "participate meaningfully in the prior proceeding" is permitted to bring it up again (res judicata doesn't apply), and the Court had to evaluate whether petitioner participated in the prior proceeding. She personally didn't participate in Appeals, or pretrial meetings, or settlement negotiations, didn't sign court documents, and only attended the trial by sitting in the courtroom. And yet, she had counsel, who acts on behalf of the petitioner and who fulfils the obligations of the petitioner as litigant. The trial was more than a year and a half after H's death; petitioner had the opportunity to pursue a §6015 case then if she so desired.

LIEN AND LEVY ACTIONS (RULE 330-334)

The Pension Protection Act of 2006/Provides Tax Court jurisdiction to review notices of determination issued pursuant to §6330 – regardless of the type of underlying tax involved. Prior to that the Tax Court only had jurisdiction over a CDP (Collection Due Process) hearing if they had jurisdiction over the underlying liability.

A **lien** arises automatically when there has been a proper assessment, notice and demand for payment, and a failure to pay (§6321). Once it arises, the lien attaches to all property and rights to property (real or personal) owned by the taxpayer then and property acquired after the lien arises.

A **levy** generally can be issued 30 days after notice and demand to seize property to collect assessed taxes (§6331) but it can be made immediately in the case of jeopardy. An offset of a refund due against a tax liability owed is not a levy and therefore no CDP rights arise; the Tax Court had no jurisdiction in *Boyd* (124 TC 18 (6/27/05)).

Taxpayers who receive a notice of lien or levy can request a hearing from Appeals to challenge the collection action proposed in the notice. At this hearing, the taxpayer can raise innocent spouse issues, dispute whether the action is appropriate or not and make offers of collection alternatives. The taxpayer can challenge the existence of amount of tax **only if** the taxpayer either did not receive any notice of deficiency or did not have any other opportunity to dispute the tax liability.

It is the date of mailing, not the date on the notice that creates the critical date for the 30-day period (but see the *Boechler* discussion, because 30 days may no longer be 30 days in the CDP context). In *Bongam* (146 TC 4 (2/11/16)) the IRS issued a notice of determination that was not sent to his last known address and was thus invalid. It was returned to respondent as undeliverable. Subsequently the same notice of determination, which was mailed to the proper address without the date being changed, was mailed to the last known address and received by the taxpayer without prejudicial delay. Even though the date listed on the notice of determination was earlier than the date of mailing, it is the date of mailing that matters.

The time during which the IRS Independent Office of Appeals is reviewing the return of an offer in compromise is not included as part of the 24-month "deemed acceptance" period under §7122(f), in *Michael D Brown* (158 TC 9 (6/23/22)).

If there is no notice of determination issued, there is no opportunity for a CDP hearing or Tax Court review. In *Atlantic Pacific Management Group, LLC* (152 TC 17 (6/20/19)) petitioner failed to timely request the CDP hearing after respondent issued a notice of federal tax lien when its TMP and managing member was not in the US when the notice arrived and did not sign for the letter. The CDP request was made 8 days late, and denied as untimely. Respondent closed the case without conducting a CDP or equivalent hearing or issuing the notice of determination, but petitioner filed a petition anyway.

When filing a notice of a lien under §6323, prior to making a levy, the IRS is required to give the taxpayer notice and an opportunity for a CDP hearing before an impartial Appeals officer. The taxpayer must make a written request for a hearing. The Appeals officer issues a Notice of Determination following the CDP; under §6330(d)(1) the Notice of Determination can be appealed within 30 days to the Tax Court. A petitioner cannot request a CDP hearing before the 30-day period begins as taxpayers have a specific right to "request a hearing during the 30-day period" *Andre* (127 TC 4 (8/28/06)).

Taxpayers are only given one hearing with respect to "the taxable period in which the unpaid tax specified in *** (the levy notice) relates." When multiple notices of intent to levy are issued for a specific tax period, the taxpayer is entitled only to one hearing for the tax period and must request the CDP hearing within the statutory period for the first notice in *Orum* (123 TC 1 (2004)). The Tax Court is only required to review the last notice of determination when determining the petitioner's financial status in *Kelby* (130 TC 6 (4/28/08)).

Taxpayers have the right to make an audio recording if they meet the requirements (sufficient advance written notice). If taxpayers were barred from making an audio recording at their CDP hearing but only advanced frivolous arguments, the case will not be remanded by the Tax Court for further consideration.

Voluntary payments are applied as the taxpayer wishes while involuntary payments may generally be applied by the Commissioner against whichever unpaid tax liabilities the

Commissioner chooses. A dishonored check is not a payment in *David H Melasky and Audrey Melasky* (151 TC 9 (10/10/18)); payments by check are conditional, subject to the condition they will be honored by the bank. Any instructions petitioners attached to the dishonored check are irrelevant. In the same case the Tax Court decided that abuse of discretion is the appropriate standard for reviewing questions about crediting payments.

A face-to-face meeting is not required and the CDP may occur by telephone (*Katz* (115 TC 329 (2000)). However, the IRS must provide the taxpayer with an in-person or telephone hearing before issuing determination letters (*Meyer* (115 TC 417 (2000)).

When the underlying tax liability is properly at issue, the Tax Court reviews the determination de novo (for the first time). Under §6330(c)(2)(B), if the taxpayer receives a notice of deficiency and fails to file a petition for review with the Tax Court, the taxpayer cannot challenge the existence or amount of the tax liability in a CDP hearing.

> Example: *Karson Kaebel* (TC Memo 2017-37 (2/21/17)) failed to file a tax return for 2010 so the IRS prepared a substitute for return (SFR) under §6020(b). At the time of trial petitioner had failed to file federal returns for 2005 through 2009. A notice of deficiency, issued in June 2013, was addressed to a street address in Lewisville, TX, which is also the petitioner's address of record with the Court. Form 3877 is used by the IRS to record mailing of the notice of deficiency, but in this instance the form was incomplete and the signature was partially illegible. On 2/12/14 respondent issued, to the same Lewisville address, a Letter 1058, *Final Notice – Notice of Intent to Levy*.
>
> Petitioner responded to that notice by requesting a CDP hearing and indicating there had been no prior opportunity to challenge the underlying liability. At trial petitioner refused to testify as to his last known address or how long he had lived there, but he denied receiving the notice of deficiency then declined to answer any of respondent's counsel remaining questions. Even though Form 3877 was deficient, it was adequate with other testimony such as the tax transcripts, the taxpayer's return, the notice of deficiency and the certified mailing list to indicate that a notice of deficiency was issued to the taxpayer's last known address.

If the petitioner withdraws or amends an Offer in Compromise (OIC) it is not an abuse of discretion for the IRS to decline the terms in the previously offered OIC J*ohnson*, 136 TC 213 (5/31/11)). If the taxpayer participates in an Appeals conference in which he was able to dispute his underlying tax liability, he may not properly raise that liability again in a CDP hearing or in Tax Court (*Lewis* (128 TC 6 (3/28/07)). An Offer in Compromise Doubt as to Liability is treated as a challenge to the underlying tax (*Baltic* (129 TC 19 (12/27/07)).

Signing Form 870-AD precludes the petitioners' ability to challenge the underlying liabilities in a collection hearing – the form consents to the immediate assessment and collection of specified deficiencies (*Estate of Bonnie Deese* (TC Memo 2007-362 (12/10/07)). If the taxpayer did not

receive a notice of deficiency or have other opportunity to challenge the underlying liability, they can do so at a CDP hearing even though the tax is self-assessed (*Montgomery* (122 TC 1 (1/22/04)). Signing Form 4549 (*Income Tax Changes*) waives the right to raise the issue of underlying tax liabilities in court regardless of whether the taxpayer signs the form (*Aguirre* (117 TC 324 (2001)) or the taxpayer's representative signs it (*Pomerantz* (TC Memo 2005-295 (12/22/05)). When the IRS files a proof of claim in a bankruptcy, the taxpayer has an opportunity to object to the claim, and to dispute the underlying substantive tax issues, which precludes taxpayer from raising the underlying tax liability in any subsequent CDP proceeding in *Kendrick's* (125 TC 6 (3/9/05)). The response to Letter 1153 (Trust Funds Recovery Penalty letter) is a prior opportunity to dispute a §6672 penalty (*McClure* (TC Memo 2008-136 (5/20/08))).

An estate is not a separate person entitled to its own collection review hearing. In *Giamelli* (129 TC 14 (10/30/07)) the petitioner was killed after filing a petition. His estate wanted to be substituted for the petitioner and sought to challenge his underlying liability. The Court ruled that his estate may not raise the underlying tax liability on appeal of the respondent's determination when the underlying liability was not properly raised during the CDP hearing. Here petitioner filed for §6320 relief without his wife's knowledge or signature. Respondent and petitioner came to an agreement, but he died before signing the decision document. His wife, now the executrix of his estate, wanted to disclose wrongdoings by her husband that she believed would change the underlying tax liability. The Court ruled the only limited decision dealt with the installment agreement considered by the Appeals Officer.

On 3/8/06 the Tax Court was reversed by the 8th Circuit court of Appeals in *Robinette*, which found the Tax Court erred in finding that the IRS has abused its discretion in imposing a levy for the amount remaining on taxpayer's original compromised liability. The case must be reviewed based upon the evidence presented to the appeals officer (the administrative record).

If the underlying tax liability is not an issue, the Tax Court reviews the determination for an abuse of discretion. For the abuse standard, the Court considers only arguments, issues or other matters that were raised at the CDP hearing. The taxpayer is permitted to petition the Court only for review of those issues raised in the CDP hearing.

If a CDP hearing is requested out of time but within a one-year period, the taxpayer may be given an equivalent hearing, an administrative hearing held by Appeals that generally follows CDP procedures. A Decision Letter is sent following an equivalent hearing and taxpayers who are granted an equivalent hearing do not get judicial review, except that a denial of relief under §6015 may still be reviewed by the Tax Court within the appropriate 90-day filing period.

> Example: *Charles J. Weiss* (147 TC 6 (8/17/16)) filed collection due process hearing requests for two delinquent tax year amounts but argued during the hearing that it was filed one day late to prevent the extension of the collection statute of limitations. Petitioner, an attorney, argued he was only entitled to an "equivalent hearing" which

would not have suspended the collection period – he did not check the box captioned "equivalent hearing" but instead intended to mail them late to trigger the equivalent hearing. Respondent contends it was filed timely within 30 days of the date on which the IRS mailed P the levy notice.

Respondent attempted to hand-deliver the Final Notice of Intent to Levy during a field call on 2/11 but was deterred by petitioner's dog. Two days later respondent initiated mailing (by certified mail) the levy notice on 2/13, but used the original levy notice dated 2/11. Petitioner received the levy notice on 2/17 (his wife signed for the levy notices but threw away the envelopes) and completed Form 12153 and mailed one on 3/13 and the other 3/14. Respondent received it on 3/16, a Monday.

The Court held that "when the date appearing on a levy notice is earlier than the date of mailing, the 30-day period prescribed by IRC section 6330(a)(2) and (3)(B) is calculated by reference to the date of mailing." The critical date was the date the notices were mailed (2/13) and thus petitioner filed his CDP request, received by respondent, within the 30-day period

But if the petitioner marks the "equivalent hearing" box on Form 12153 before expiration of the 30-day period during which he could request a CDP hearing, he is still granted a CDP hearing. Filing the request timely "necessarily triggered" a CDP hearing in *William Ruhaak* (157 TC 9 (11/16/21)/

The Court will not go behind a Notice of Determination to evaluate the sufficiency of the hearing provided to the taxpayer in *Lundsford* (117 TC 16 (2001)). A supplemental determination notice relates back to the original notice and is not a new determination to which the provisions of §6330(d) apply in *Ginsberg* (130 TC 7 (4/28/08))).

The $50,000 small case limitation applies to the aggregate of tax, interest and penalties, not an amount calculated per year in *Schwartz* (128 TC 2 (2/14/07)).

EXAM ALERT!

One of the hottest topics currently surrounding collection due process is the Supreme Court decision in *Boechler* (*Boechler, P.C. v Commissioner of Internal Revenue*, No. 20-1472, decided 4/21/22).

Boechler is a North Dakota law firm. The IRS notified them of a discrepancy in their tax filings, and when the taxpayer did not respond, the IRS assessed an "intentional disregard" penalty and notified the firm of its intent to levy property to satisfy the penalty. Boechler requested a CDP hearing and Appeals sustained the penalty. According to §6330(d)(1), Boechler had 30 days to petition the Tax Court for judicial review, but Boechler filed the petition one day late. The Tax Court dismissed for lack of jurisdiction, and the Eighth Circuit affirmed. The Supreme Court

disagreed, ruling that the §6330(d)(1) 30 day filing deadline is a nonjurisdictional deadline, subject to equitable tolling.

Jurisdictional requirements cannot be waived or forfeited, but nonjurisdictional rules "promote the orderly progress of litigation."

Section 6330(d)(1) provides: "The person may, within 30 days of a determination under this section, petition the Tax Court for review of such determination (and the Tax Court shall have jurisdiction with respect to such matter)."

Whether Boechler is entitled to equitable tolling should be determined on remand, but the filing deadline "can be equitably tolled in appropriate cases."

That means when answering questions on the 2023 exam you need to address the equitable tolling issue and not just answer that a petition with respect to an adverse CDP notice of determination must be filed within 30 days.

CDP QUICK & DIRTY

Remember these arguments as they appear often in one variation or another during a hearing. Taxpayers who advance arguments that 1) IRS notices are invalid because they are not signed under penalties of perjury, 2) an Appeals officer does not meet requirement of §6330(1), 3) a "procedurally proper" Notice and Demand for Payment was not issued, and that they 4) are entitled to an examination interview or administrative appeal are not going to prevail. Documents arising under §6065 requiring signature under penalty of perjury refer to taxpayer's signature. Certified copies of Forms 4340 are enough to show the taxpayers are properly assessed and the notices are properly made. Form 4340 provides presumptive proof. Appeals officers are only required to verify that an assessment has been made; they are not required to provide that assessment to the taxpayer. Prior to the issuance of a notice of deficiency taxpayers do not have the right to an examination interview or an administrative appeal. The IRS can use a computer-generated Revenue Accounting Control System Report (RACS 006) instead of Form 23C.

EXAM ALERT!

Abuse of discretion is the usual standard the Tax Court uses to review the IRS's decision in CDP and §6404 cases. The taxpayer must show the Commissioner exercised his discretion "… arbitrarily, capriciously, or without sound basis in fact or law." (*Lee*, 113 TC 145 (1999)).

The case is heard de novo if the liability is properly at issue.

EQUITABLE RECOUPMENT

The Tax Court may apply the doctrine of equitable recoupment to the same extent it is available in the district courts and Claims court even if the court lacks subject matter jurisdiction over the type of tax to which the equitable recoupment claim is directed.

To 'recoup' is to 'get back the equivalent of something lost.' Equitable recoupment is a judicially created doctrine that allows a claim for a refund of or a deficiency in taxes barred by a statute of limitations to be recouped, or offset, against a tax claim of either the government (time-barred refund) or a taxpayer (time-barred deficiency assessment). The necessary elements to sustain a claim of equitable recoupment require:

- the refund or deficiency is time-barred (beyond statute),
- the offset arises out of the same transaction, item or taxable event as the overpayment or deficiency before the Court, **and**
- the transaction, item or taxable event previously was inconsistently subject to two taxes (such as estate and income taxes).

WHISTLEBLOWER ACTIONS (RULES 340-345)

The Tax Court has jurisdiction of a whistleblower action when the conditions of §7623(b)(4) are satisfied. §7623(b)(1), as amended in 2018, provides that if the Secretary proceeds with any administrative or judicial action based on information brought to the Secretary's attention, that individual will receive an award of at least 15% but not more than 30% of the proceeds collection as a result of the action. Both initiation of an action and collection of proceeds are prerequisites for an award.

The whistleblower must specifically provide information to be eligible for the award; in *Michael Lissack* (157 TC 5 (8/17/21), petitioner's Form 211 mentioned membership fees that he felt weren't reported as gross income. The IRS found that the membership fees were properly reported, but during the exam the IRS found an unrelated erroneous deduction, yielding a $60 million adjustment. No whistleblower award was made because the revenue agent discovered the entirely separate issue by his independent review, and not information from petitioner's Form 211.

As happens with a deficiency case, the whistleblower's claim survives the petitioner's estate has standing to be substituted as petitioner (*Joseph Insinga* (157 TC 8 (10/27/21).

In *Whistleblower 22716-13W* (146 TC 6 (3/14/16)) the civil penalties were excluded from determining whether the $2,000,000 "amount in dispute" requirement was satisfied because they are collected under Title 31.

Whistleblower awards depend on the IRS both <u>initiating</u> an administrative or judicial action and <u>collecting</u> Title 26 proceeds (tax, penalties, interest, additions to tax, etc.) if the disputed amount exceeds $2 million.
The award is at least 15%, but not more than 30%, of the collected proceeds.

Whistleblower21276-13W (147 TC 4 (8/3/16)) sought awards which were rejected as untimely. In a previous court case (noted above) the Tax Court found their claims were timely and

ordered the parties to attempt to resolve their differences. Subsequently the parties agreed that petitioners (H&W) were eligible for an award of 24% of the collected proceeds. The targeted taxpayer pleaded guilty and paid $74,131,694 in tax restitution ($20,000,001), a criminal fine, and civil forfeiture to the Government. The parties disagreed whether the criminal fine and civil forfeitures counted as collected proceeds – the Court found they were by examining the plain language (collected proceeds means all proceeds collected).

Whistleblower 26876-15W (147 TC 12 (11/9/16)) filed a claim with respect to TP1. Respondent examined the returns but closed the exam with no change. On 5/29/14, W, the Director of the Whistleblower Office, executed Form 11369, *Confidential Evaluation Report on Claim for Award*, approving denial of petitioner's claim on the ground that no proceeds were collected. The final determination letter, signed by a member of W's staff, was mailed 5/30, but not to petitioner's last known address and he never received it. In September 2015 petitioner contacted the Whistleblower Office seeking an update on his claim. On 10/15/15 respondent mailed a letter informing him that the claim was closed and attaching a copy of the 5/30/14 letter. Petitioner filed his petition on 10/26/15 and on 7/1/16 he filed a motion arguing that the final determination letter was "null and void" because it was not signed by W, in alleged violation of Delegation Order 25-7. Nothing in that delegation order, or anywhere else, requires that W personally sign a letter informing petitioner that the claim was denied – W properly exercised his authority when he executed Form 11369 approving denial. The 5/30/14 letter was invalid because it was not mailed to petitioner's last known address, and petitioner did not actually receive it.

The court held that the "amounts in dispute" referenced by the IRC threshold are the total amount of the liability that respondent proposed with respect to the taxpayer's examination that was commenced using information provided by a whistleblower, and not limited to a part attributable to the whistleblower's information or specific allegations in *Ian Smith* (148 TC 21 (6/7/17)). The petitioner provided information to respondent which was used to assess and collect almost $20 million. Respondent determined that slightly less than $2 million of the collected proceeds was collected from information provided by petitioner and made a discretionary whistleblower award. Petitioner was not happy and wanted it based on the full $20 million which resulted in a nondiscretionary award. The whistleblower's information related to unreported employment taxes for which there was a direct claim, but it led to issues also with income tax, and there wasn't a direct claim to that portion of the issues (the company was using gift certificates to pay employees without reporting that through payroll reporting or on W2s, but also wasn't reporting gift certificate income).

In *Whistleblower 4496-15W* (148 TC 19 (5/25/17)) the court found that the IRS's issuance of a check to the whistleblower was a 'determination' that gave the taxpayer 30 days to file a petition. He filed an application for an award and was offered an award that was reduced by 7.3% ($232,697) on account of the sequester imposed by the Budget Control Act of 2011. Petitioner accepted the award, and in exchange for prompt payment, waived his judicial appeal rights to the US Tax Court. After cashing the $2.1 million (less Federal tax withholding)

petitioner filed a petition challenging the 7.3% reduction of his award. The IRS specifically advised petitioner's counsel that they would not make any subsequent adjustments to the sequestration reduction, and the Court found he was bound by his explicit waiver of the right to seek judicial review.

Whistleblower cases may proceed anonymously under Rule 345 when disclosure would impact employment or other close relationship with the taxpayer. The Court has granted it when there was threat of physical harm or financial retaliation. Anonymous proceedings require special handling the Court – the record is sealed temporarily, the normal procedures for electronic filing and service cannot be used, the case must be assigned to a judicial officer earlier than normal to address the motion, and at times trials and hearings must be closed to protect the whistleblower's identify. Permitting a petitioner to proceed with anonymity is less drastic than granting a request to seal the record. The risk of harm must exceed mere embarrassment or annoyance, including protecting from physical or other substantial harm or protecting personal, sensitive information. Counsel names for respondent and petitioner are also sealed.

In whistleblower cases, the Tax Court can only look at the Commissioner's award determination and not to redetermine the tax liability in *Cooper* (136 TC 30 (6/20/11)). If the IRS fails to proceed, or does not collect any proceeds, there is no whistleblower award.

Each Whistleblower Office letter denying a whistleblower claim gives the petitioner 30 days to petition the Tax Court (in *Kasper* (137 TC 4 (7/12/11)) the respondent bifurcated the claim). Respondent must prove by direct evidence the date and fact of mailing the determination. The 30-day period begins on the date of mailing, and the petition must contain the following information:

- the petitioner's name, state of legal residence and mailing address – as of the date the petition is filed,
- the date of the determination regarding an award under §7623(b)(1), (2) or (3) by the IRS Whistleblower Office,
- lettered statements explaining why the petitioner disagrees with the IRS Whistleblower determination,
- lettered statements setting forth the facts on which the petitioner relies,
- prayer for relief,
- signature, mailing address and phone number of petitioner or Counsel as well as Counsel's Tax Court bar number,
- filing fee of $60, **and**
- request for Place of Trial.

Rule 36 (Answer), 37 (Reply) and 38 (Joinder of Issue) all apply to Whistleblower Actions.

EXAM ALERT!

This is a potential exam topic especially as more Whistleblower cases come before the Court, and the Court must interpret and apply the statutes much as it had to with §6015 and §6320

and §6330 after the 1998 IRS Reform and Restructuring Act. Apparently a "cottage industry" has sprung up with individuals involving mining publicly available documents for a chance to "claim a bounty from the IRS" so there are a lot of claims filed with the Whistleblower Office.

CERTIFICATION/FAILURE TO REVERSE … WITH RESPECT TO PASSPORTS (RULE 350-354)

If a taxpayer has a seriously delinquent debt, the law authorizes the IRS to certify that debt to the State Department for action. The State Department will generally not issue a passport to the taxpayer after receiving this certification from the IRS.

As of 1/23/23 the amount of legally enforceable federal tax debt, including interest and penalties, considered to be seriously delinquent tax debt is $54,000; this amount is annually adjusted for inflation. The IRS certifies the debt for which 1) a notice of federal tax lien has been filed and all administrative remedies under the law have lapsed or have been exhausted, or 2) levy has been issued. Some debt isn't included in the definition of seriously delinquent tax debt, including that being paid timely with an IRS-approved installment agreement or with an OIC accepted by the IRS or a settlement agreement entered with the Justice Dept, or for which a CDP hearing is timely requested regarding a levy to collect the debt, and for which the collection has been suspended because a request for innocent spouse relief has been made. Other conditions apply as well.

The IRS sends Notice CP508(C) to the taxpayer at the time the IRS certifies seriously delinquent tax debt to the State department; the notice will be sent by regular mail to the last known address, and the power of attorney will not receive a copy. Before denying a passport, the State Department will hold the application for 90 days to allow the taxpayer time to resolve erroneous certification issues, make full payment of the tax debt, or enter a satisfactory payment arrangement with the IRS. A Notice CP508R is sent at the time the IRS reverses certification.

The Tax Court has jurisdiction over an action to determine whether the certification or a failure to reverse a certification under §7345(e) when the conditions of that section are met. Section 7345(e)(1) lets a taxpayer bring a civil action in the Tax Court to determine whether the Commissioner erroneously issued a certification described in the code. In other words, a taxpayer can file suit in the Tax Court and let the Court determine whether the certification was erroneous or whether the IRS failed to reverse the certification when it was required to do so. New Title XXXIV was added to cover this area which was effective after 12/4/15. The Court has jurisdiction whether the certification was erroneous, or whether the Commissioner failed to reverse the certification under §7345(e) when the conditions for that section are satisfied.

A certification action is commenced by filing a petition with the Court (substantially similar to the Rule 34 requirements, the date of the notice of the certification must be also stated and a copy of that notification appended). The filing fee is also $60.

The Tax Court does not have jurisdiction to determine whether the taxpayer has a constitutional right to international travel, nor does the Tax Court have jurisdiction to review the underlying liabilities. In *Blake Adams* (160 TC 1 (1/24/23) petitioner had $1.2 million in debt that the IRS certified as a seriously delinquent tax debt. The IRC only requires that the debt "has been assessed" and not that it has been 'properly assessed' as petitioner argued.

NO TAX COURT JURISDICTION EXISTS

IRC sections that do not involve deficiencies do not confer jurisdiction on the Court (*Odend'hal*, 95 TC 617 (1990)). Thus, no Tax Court jurisdiction exists when the IRS is not required to issue a notice of deficiency, which allows the IRS to assess the penalties directly [IRM 8.17.7.1.1 (9/24/13). This includes:

- §6672 penalty (Trust Fund Recovery Penalty),
- §6682(a) penalties (filing false Forms W-4),
- §6654/6655 penalties (underestimated income tax), when a return has been filed,
- interest only – can determine any addition to tax, which refers to civil tax penalty, not to interest, **and**
- notice of assessments under §6213(b)(1) that arise out of mathematical or clerical errors as these are not considered to be notices of deficiency.

Other situations where the Tax Court does not have jurisdiction include:

- imposition of frivolous return penalties (*Van Es* (115 TC 324 (2000)), but remember they can hear a CDP case relating to frivolous return penalties,
- review of collection activities if the taxpayer fails to request a CDP hearing (without a determination by Appeals there is nothing to review, according to *Offiler* (114 TC 492 (2000)),
- if a claimed overpayment in years not subject to a petition reduces a claimed deficiency (*Kazi* (61 TC Memo 1759 (CCH) (1991)). See also *Savage* (112 TC 46 (1999)) that held the Court was without jurisdiction to review the IRS's application of an alleged overpayment for the tax year at issue to deficiencies that allegedly arose during years not at issue before the Tax Court, **and**
- No jurisdiction to determine whether the respondent improperly applied payments. In *Bocock* (127 TC 12 (10/30/07)) the petitioners made payments to their 2002 return which was later applied to the husband's 1978 outstanding tax liability. Respondent determined a deficiency in income tax and an accuracy-related penalty. A timely petition was filed. The Court ruled it has no jurisdiction to review any credit or reduction made by the Commissioner under §6402(a), §6512(b)(4).

EXCLUSIVITY OF JURISDICTION

Once invoked, the Tax Court's jurisdiction is exclusive. A taxpayer cannot go to a district court or the court of Federal Claims for a refund relating to the same tax in the same period under §6512(a). Once jurisdiction is invoked, the taxpayer cannot withdraw his petition for review without prejudice. No transfer of jurisdiction from the Tax Court will be permitted to allow a taxpayer to have a jury trial.

If a notice of deficiency is issued while a refund claim is pending in another court, the taxpayer can petition the Tax Court for review of that action. The case then falls under its jurisdiction (*Kuhn* (TC Memo 1372 (1981)).

> Example: *Bradley Ballard and Poncella Ballard* (TC Memo 2017-57 (4/6/17)) timely filed a petition on 3/6/14, to which the respondent filed an answer affirmatively alleging facts supporting the deficiency and penalty determinations on 7/31/14. Petitioners filed a reply denying those allegations on 10/29/14. Then petitioners failed to cooperate with respondent to prepare the case for trial and neglected to properly prosecute it before the Court. The proposed stipulations were deemed admitted because petitioners failed to respond to the court's order to show why they should not be deemed admitted. Respondent filed a motion for summary judgment and petitioners failed to file a response to the motion. They failed to appear for the trial session. That's not going to end well … the Court found they underreported income, overstated expenses and he was eligible for the fraud penalty for some years (his actions could not be imputed to her).

BURDEN OF PROOF

WHAT IS BURDEN OF PROOF?

Generally, the burden of proof in Tax Court is on the petitioner to a preponderance of evidence, except as by statute below or where the taxpayer introduces credible evidence. Burden of proof refers to the amount of evidence necessary to establish a disputed fact or a degree of belief in the mind of the Court. There are two elements of burden of proof:

- the burden of producing evidence, satisfactory to the judge, of a particular fact in issue (also called the burden of going forward), **and**
- the burden of persuading the judge that the alleged fact is true.

STANDARDS OF PROOF

Depending upon the type of case at trial, one of three standards of proof must be met by the evidence presented during a case.

Burden of proof = burden of production + burden of persuasion.
The standard of proof in Tax Court is preponderance of evidence.

The burden of proof is generally on the petitioner,
but it is on the respondent under §7491 and in other situations.

The lowest standard is **preponderance** of the evidence, which is the burden most often to be met in the Tax Court. According to Gilbert Law Dictionary, preponderance is "all evidence more clearly and more probably favors one side than the other." Effectively this is a 51% test; enough evidence was produced so a reasonable person can determine the evidence makes it

'more likely than not.' In the Tax Court, the petitioner must prove that it is more likely than not the IRS's determination of the tax deficiency is erroneous.

The next higher standard is **clear and convincing**, which is the standard that must be met in civil tax fraud cases. It is a more exacting standard than preponderance but is more difficult to define and establish than the other standards of proof. Gilbert Law Dictionary defines it as the "degree of proof required to produce a firm belief concerning the truth of facts" and indicates that it is a higher standard than preponderance, but lower than beyond a reasonable doubt. The highest standard, **beyond a reasonable doubt**, does not apply in Tax Court or civil litigation. Applied in criminal cases, this standard does not require absolute certainty, but is a high enough level of certainty that leads an honest, conscientious juror to convict a person of a crime.

SHIFTING BURDEN OF PROOF TO THE IRS

The IRS Restructuring and Reform Act of 1998 §7491 shifts burden of proof to the IRS with respect to a factual issue only if the taxpayer presents credible evidence and demonstrates he or she met these conditions:

- compliance with substantiation and recordkeeping requirements of the IRC,
- maintenance of all records required by the IRC
- cooperation with the IRS, including timely response to reasonable requests and assisting the IRS in obtaining information not within the taxpayer's possession or control, **and**
- net worth limitations are met so a corporation, trust, or partnership cannot exceed $7,000,000 net worth. No net worth limitations apply to an individual.

To shift burden to the IRS at a minimum the taxpayer must produce credible evidence of each material element to the underlying issue. In *Blodgett* (TC Memo 2003-212, affirmed by 8th Circuit 394 F.3d 1030 (8th Circuit 2005)) the circuit court found that while a Tax Court must consider the testimony as if no contrary evidence were submitted, it has the right in the first place to reject the testimony as not credible.

The taxpayer must also cooperate at all stages of the proceeding, including pre-trial activities, but does not need to extend the statute of limitations. In *Lopez* (TC Memo 2003-142) the petitioner refused to meet with respondent's counsel before trial, refused to provide copies of documents on which the IRS intended to rely at trial, and refused to stipulate. The Court was not swayed by petitioner's argument that they expected S case status and mistakenly believed the parties did not have to meet to properly prepare for trial.

The IRS bears the burden of proof when it:

- uses statistical information to reconstruct an individual's income, but the burden only applies to that income item,
- imposes the accumulated earnings tax on a corporation (under §534 this tax is for holding cash beyond reasonable needs of a corporation),
- charges the taxpayer is guilty of fraud with intent to evade tax (which requires burden of

proof be met at the clear and convincing standard),
- pleads an affirmative defense in the Answer (statute, res judicata, collateral estoppel – see the appropriate section for a discussion on these defenses),
- imposes an excise tax on foundation managers or trustees for self-dealing, disqualifying lobby expenditure, or illegal bribe/kickback schemes (at the clear and convincing standard) under §4946, §4941, §4944, and §4945,
- increases liabilities claimed due after the notice of deficiency is issued,
- raises new matters not in the deficiency notice,
- adds to the deficiency, **or**
- raises the issue of transferee liability (if found to be the transferee of property belonging to the taxpayer, petitioner then has burden to establish the taxpayer was not liable for the tax).

In Tax Court proceedings, the IRS must initially come forward with evidence (the burden of production) to establish it is appropriate to apply a penalty, addition to tax, or any additional amount before the Court can impose that amount. The taxpayer then can introduce evidence of reasonable cause, substantial authority, and so forth to mitigate the penalty.

Substantial authority exists for a tax treatment only if the weight of the authorities supporting the treatment is substantial in relation to the weight of authorities supporting contrary treatment. Pertinent authorities for substantial authority include the IRC, other regulatory provisions, regulations, revenue rulings, and court decisions, but not opinions rendered by tax professionals.

A presumption of correctness accords the IRS a prima facie case; Gilbert Law Dictionary defines prima facie as "on its face … fact is convincing without further proof of validity." The statutory notice of deficiency is presumed to be properly issued and effective to beginning running the 90/150-day clock. The Tax Court generally does not look behind the notice of deficiency to see how the IRS determined it. If the taxpayer can show the IRS determination is arbitrary or erroneous, the presumption of correctness disappears and burden of proof shifts to IRS. Note that this only applies in limited circumstances.

MEMORY TOOL: CATINASAFE
Shift Burden to IRS:

C – **credible evidence** (TP cooperates, meets net worth)
A – **affirmative** defenses
T – **transferee** liabilities
I – **increases** liabilities
N – new matters
A – adds to deficiency
S – statistical income reconstruction
A – **accumulate**d earnings tax

F – **fraud**
E – **excise** tax

Additionally, the IRS must come forward with evidence that a penalty is appropriate.

DISCOVERY (RULE 70)

Since the 1970s, formal discovery practices have been expanded within the Tax Court. Discovery enables a litigant to obtain documents (including those electronically stored) or things necessary to prepare a case or to assess opposing party's position. The requested information or document must be produced if it is reasonably likely to lead to discovering admissible evidence, regardless of who has burden of proof.

Any matter not privileged that is relevant to the subject matter in the case is discoverable. A requested item must be furnished if it is reasonably calculated to lead to admissible evidence. Discovery may lead to evidence, but matters produced in discovery are not evidence. A party must either offer items or information discovered as evidence during the trial (where the items or information must be authenticated after the proper foundation is laid) or submit them to Court as part of a stipulation of facts.

Generally, discovery within the Tax Court is much less formal than is permitted under the Federal Rules of Civil Procedure. The Court relies heavily on informal discovery, which may start at any time and has no formal ending time. The Court requires that informal discovery be attempted before formal discovery methods are used; it is in the best interest of all parties to begin informal discovery as soon as the names of opposing counsel are known.

A Branerton (*Branerton*, 61 TC 691 (1974)) conference is required before formal discovery can commence, but in practice it may occur after that time starts. In *Branerton* the taxpayer attempted to take advantage of what were then brand-new discovery rules by immediately filing interrogatories before any informal requests were made. The IRS moved for a protective order (discussed in a later section), which was granted by the Court.

Merely making an informal request for information and offering to receive it in person does not satisfy the consultation required by informal discovery. There must be discussion, deliberation, and an exchange of ideas between the parties.

Formal discovery cannot start until 30 days after joinder of issue, and must be concluded 45 days before calendar call. This means a formal discovery request must be served more than 75 days prior to calendar call to allow the 30 days for a response so a motion to compel, if necessary, can be filed within the 45-day period. Knowing how to calculate the conclusion date is important. Count backwards from the day before calendar call, including weekends and holidays. If the last day falls on a Saturday, Sunday, or holiday in the District of Columbia, the

discovery date moves to the next **preceding** day that is not a Saturday, Sunday, or holiday in the District of Columbia.

Discovery on a deposition may not be commenced before a notice of trial has been issued or the case has been assigned to a judge or Special Trial Judge. Discovery on the issue of a party's entitlement to reasonable litigation or administrative costs cannot be commenced before a motion of those costs has been noticed for a hearing and must conclude no later than 45 days prior to the date set for hearing.

If a response was correct and complete when it was made there is generally no requirement that it be supplemented. However, a prior response must be amended if it was incorrect when made, or if it is no longer true and failure to amend it is a knowing concealment.

> Example: Respondent files an interrogatory (discussed below) requesting the name of petitioner's expert witness, the expert's qualifications, and the subject matter of the expert's report. If petitioner has not yet hired an expert, an appropriate response to the question is a lack of knowledge. When the expert is retained, petitioner must supplement the response to this interrogatory to provide that information.

A party need not provide discovery of electronically stored information from sources the party identifies as not reasonably accessible because of undue burden or cost; the party must make that showing.

INTERROGATORIES (RULE 71)

Interrogatories are written requests for information, which must contain separately numbered, sequentially written questions. The answers must use the same numbering system as the interrogatories. The answers to interrogatories, things produced in response to a request, or other info or responses obtained under Rules 71, 72, 73, 74 may be used at trial or in any proceeding in the case prior or subsequent to trial as permitted by the rules of evidence.

The Tax Court relies on informal discovery, including the Branerton conference.
Formal discovery starts 30 days after joinder of issue,
and ends 45 days before calendar call.
Go backwards on the calendar if that ends on a Saturday, Sunday or DC holiday.

Interrogatories may be served on any party without leave of the Court but cannot be served on nonparties. The Tax Court limits the number of interrogatories one party may serve upon another party to 25, including all discrete subparts, to encourage the voluntary exchange of information, to enhance efficiency and to allow the Court to exercise greater control over the use of interrogatories. The opposing party has 30 days to answer, unless the Court otherwise allows (interrogatories must therefore be served at least 75 days prior to calendar call).

Responses must be made completely and in good faith, with objections specifically noted. The party must make a reasonable inquiry to obtain facts; without a reasonable inquiry, lack of information cannot be used as an answer. All answers are signed under oath.

Interrogatories may be used to require the opposing party identify each expert witness to be called along with the name/address/vocation/occupation and a statement of the witnesses qualifies, and to state the subject matter and substance of the facts/opinions to which the witness is expected to testify. In lieu of the statement a copy of the report with the information may be provided.

If business information (including electronically stored information or from an inspection of records or a compilation) provides the answer to an interrogatory, the opposing party can be given a reasonable opportunity to examine, copy, summarize or abstract the answers. Without leave (permission) of the Court, a party can request the production of documents and things from any party (not nonparties). Requests can be made that any tangible thing be available for inspection (including real property), copying, and testing.

In *Pleir* (92 TC 499 (1989)), the IRS served the taxpayer with a set of interrogatories consisting of a blank Form 1040, a request to fill out the form, and four sheets of paper requesting a list of all documents relating to any item on the Form 1040. When the taxpayer did not respond, the IRS filed a motion to compel; the taxpayer filed for a protective order, which was granted. The IRS motion was denied because the interrogatory should be "simple, concise and concerning only matters relevant to the action" and should pose a "single, definite question."

DEPOSITIONS (RULE 73)

A transferee of property of a taxpayer is entitled before trial to examine the books, papers, documents, correspondence, electronically stored information and other evidence of the taxpayer, but only if the transferee is a petitioner seeking redetermination of the transferee's tax liability.

DEPOSITIONS FOR DISCOVERY PURPOSES (RULE 74)

With the consent of all parties, depositions can be taken of any party or nonparty. The party taking deposition bears costs. Transcripts must be made of every deposition but need not be filed with the Court.

The taking of a deposition of a party, nonparty witness, or expert witness without consent is an extraordinary method of discovery and may be used only where a party, a nonparty witness or an expert witness can give testimony or possesses documents, electronically stored information, or things which are discoverable, and where such things cannot practicably be obtained through information consultation or communication, interrogatories, a request for production of documents or things, or by a deposit taken with consent of the parties.

An expert witness can be deposed without consent of all parties. This can be undertaken only after a notice of trial issued, or the case is assigned to a judge or Special Trial Judge. The expert's deposition is limited to these items:

- their knowledge, skill, experience, training or education,
- their opinion,
- facts or data underlying the opinion, **and**
- their analysis.

The Court may order that the deposition transcript serve as the expert witness report required by Tax Court Rule 143(g)(1).

Nothing precludes the taking of a deposition after trial has commenced in a case, upon approval or direction of the Court. The Court may impose conditions on taking the deposition as it may find appropriate.

Although normally frowned upon, depositions may be taken on written questions under Rule 84; this method is required when a deposition is given in a foreign country.

Depositions may be made to perpetuate testimony under Rule 81(a) only where there is a substantial risk that a person or document, electronically stored information, or thing involved will not be available at trial. They may even be taken before the case is commenced. The deposition must relate only to testimony that is not privileged and is material to the matter in controversy. Good cause must be shown to take a deposition to perpetuate testimony; they cannot be done simply because party desires it.

> Example: In *Haber* (*Estate of Neil I. Haber, Deceased*, 91 TC 20 (1988)) the estate wanted to depose and perpetuate the testimony of the 38-year-old CPA who prepared the estate tax return because the CPA engaged in dangerous sporting activities, including motor cross racing, scuba diving, and flying ultra-light airplanes. The CPA did not smoke and drank only socially. As the Court determined the CPA was not aged, threatened by illness or infirmity, and had no plans to be out of the country indefinitely, the estate's application for an order to take the deposition to perpetuate testimony was denied.
>
> Example: A joint IRS/petitioner application to perpetuate testimony was permitted in *GlaxoSmithKine Holdings (Americas) Inc* (117 TC 1 (7/5/01)). The individuals were in their 70s (75 and 77), lived in the United Kingdom, and their testimony was deemed critical in a trial that was not expected until 2005 or 2006.
>
> Example: To differentiate GlaxoSmithKine, *Shaw* 82 (TC Memo 2001-287) did not permit the deposition to perpetuate testimony in a case where the audit had not yet commenced. The Shaws, siblings (71 and 78 years old) who reside in the United States, were concerned that after their deaths the IRS will determine the value of certain trusts should be included in the estates. They contended they were the only living persons

with knowledge of the circumstances related to the trusts. The Court ruled that it was likely one of them would be alive to testify at the trial for the estate of the other.

In Rule 85 all errors and irregularities for obtaining approval for a deposition are waived unless made in writing within the time for making objections or promptly where no time is prescribed. An objection to using the deposition, in whole or part, can be made at the trial or hearing. But objections to the competency of a witness or the competency, relevancy or materiality of testimony are waived by failure to make them before or during taking of the deposition.

MEMORY SUMMARY – DEPOSITIONS
Summary of Deposition Rules

With consent – any party or nonparty can be deposed
Without consent – party or nonparty and expert witness can be deposed if the Court permits and it is not possible to obtain the information or thing through informal consultation
Perpetuate testimony – only if there is real risk not available at trial
Expert witness – allowed without consent only on skill/opinion/facts/analysis

SUPPLEMENTATION OF RESPONSES (RULE 102)
A party who responded to a request for discovery or request for admission in a manner that was complete at the time it was made is not obligated to supplement the response for information obtained later except:

- to identify persons who have knowledge of discoverable matters and expert witness identity,
- if the party obtains information and knows the response was incorrect when made, or if the response is no longer true and a failure to amend is a knowing concealment, **or**
- a duty to supplement responses may be imposed by order of the Court, agreement of the parties, or any time prior to trial through new requests to supplement prior responses.

PROTECTIVE ORDERS (RULE 103)
Upon motion by a party or other affected person, or on the Court's own, and for good cause, the Court may make order to protect a party from annoyance, embarrassment, oppression, or undue burden or expenses. Common defenses raised to improper discovery include claims that discovery is:

- overbroad,
- burdensome,
- unintelligible,
- ambiguous,
- repetitive, **or**
- violates privilege.

The moving party must show good cause for the order. Willie Nelson (*Willie Nelson Music Company* (85 TC 914 (1985)) was unable to convince the Court that his fame led him to be "seriously and irreparably damaged by the public's impressions" that he was subject to criminal tax prosecution. His motion for a protective order to seal all proceedings was denied.

What if the IRS continues to obtain information after a Tax Court petition is filed? In *Ash* (*Mary Kay Ash*, 96 TC 459 (1991)), the IRS issued an administrative summons in September and October 1989. Also, in October, the IRS issued a deficiency notice, for which Ash filed the Tax Court petition in December 1989. Ash filed for a protective order to prevent the Service from "… obtaining, reviewing, or using information obtained from the summonses after the date her petition was filed." The IRS issued additional summonses in 1990. The Tax Court denied her motion citing that while enforceability of summonses is not within its jurisdiction, the Court has the authority to regulate their use within Tax Court. The Court ruled it would not issue a protective order for summonses issued before the filing of the petition because "… such use of administrative summonses does not circumvent the Tax Court's discovery rules." The Court also held it does not have the authority to issue protective orders under Tax Court Rule 103 to restrict use of information that is not obtained through the Court's discovery procedures.

The Court may issue protective orders when justice requires, including but not limited to:

- that a particular method or procedure not be used.
- That the method or procedure be used only on specified terms and conditions, including at a designated time or place.
- That a method or procedure be used other than the one selected by the party.
- That certain matters not be inquired into or that the method be limited to certain matters or to any other extent.
- That the method or procedure be conducted with no one present except persons designated by the Court.
- That a deposition or other written materials, after being sealed, be opened only by order of the Court.
- That a trade secret or other information not be disclosed or be disclosed only in a designated way.
- That the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the Court.
- That expense involved in a method or procedure be borne in a particular manner or by specified person or persons.
- That documents or records, including electronically stored information, be impounded by the Court to ensure their availability for the purpose of review by the parties before trial and for use at trial.

The petitioner was granted a protective order in *Schneider Interests, LP* (119 TC 8 (9/30/02)). Four months after the case was docketed, the IRS filed a *Branerton* letter along with 68 pages of questions and requests for documents with a June 12, 2002 deadline for response. On June 14, 35 days later, the IRS served petitioner with 77 pages of interrogatories and 78 pages of

requests for production of documents. The IRS refused petitioner's suggestion that formal discovery be postponed until the parties had a conference. Petitioner filed a Motion for Protective Order, which was granted. The Court noted that the parties are to utilize informal consultation or communication before employing formal discovery procedures.

ENFORCEMENT ACTION AND SANCTIONS (RULE 104)

Rule 104 permits the Court to order sanctions upon noncompliance with discovery requests. Noncompliance includes failure to answer discovery, failure of a corporate party to assign a proper party to answer or providing incomplete or evasive answers. The Court may also require sanctions for failure to appear at scheduled depositions. For purposes of this section, an evasive or incomplete answer or response is treated as a failure to answer or respond.

The normal procedure for sanctions requires two steps. First a party files a motion with the Court to order compliance. If the offending party still refuses to cooperate, the moving party then requests the Court order sanctions. Sanctions can also be used as punishment for other infractions that occur during hearings or at trial.

The Tax Court commonly responds to willful failures by dismissing the action or by entering a default judgment. The Court may also award reasonable costs, unless the Court finds the failure was substantially justified or that other circumstances make such an award unjust.

Failure to provide electronically stored information will not be sanctioned as long as the information was lost as a result of the routine, good-faith operation of an electronic information system.

At its discretion, the Court may order:

- a disobedient party is prevented from testifying,
- matters are deemed admitted,
- part or all pleadings struck,
- proceedings stayed until an order is obeyed,
- dismissal of part or all of a case,
- judgment rendered against the disobedient party,
- a disobedient party held in contempt,
- monetary sanctions imposed, **or**
- any other action it deems appropriate.

Additionally, a Tax Court judge can impose monetary sanctions for a taxpayer's egregious conduct of up to $25,000 under §6673 (see below for more details). An attorney, either one employed by the IRS or one retained to represent a taxpayer, can be ordered to compensate the other side for excess costs resulting from the offending conduct.

Examples of various procedures can be found in *Reedy* (TC Memo 2008-100 (4/15/08)). Petitioners received proceeds from liquidation of their corporation and sent money to an

offshore trust/tax avoidance scheme known as Anderson Ark. They failed to timely file their 2000 and subsequent year returns, and when filed, the 2000 return did not include the liquidation proceeds. The case provides examples of various procedural matters including the respondent's affirmative allegation of an addition to tax (page 2), the petitioner's response (page 3-4) and a request for admissions (page 4-5) and motion to compel (page 5-6). The petitioner's counsel makes a motion to withdraw (page 6). Respondent moves to change the venue (page 7-8) and for a continuance. Respondent requests sanctions for failure to comply with a court order (page 8-9).

In *Sterling Trading Opportunities, LLC* (TC Memo 2007-339 (11/14/07)) the IRS moved to compel production of documents that petitioner argued were prepared in anticipation of litigation and therefore entitled to work product protection. Work product may be subject to discovery if the information is essential to the opponent's case and is otherwise unavailable. The IRS attempted to obtain that information by interviewing witnesses who attended the meeting that was subject to the memo IRS now seeks, but the witnesses do not recall the meetings or could not provide details. There were no "opinion work product" pieces in that memo (which includes mental impressions, conclusions, opinions or legal theories of an attorney or other representative). The Court examined the items in camera before making its determination.

In *3K Investment Partners et al* (133 TC 6 (9/3/09)) petitioner moved to compel respondent to produce redacted copies of all tax opinions collected by respondent related to the Son-of-BOSS transactions. The Court ruled that because the materials petition sought are "not relevant and do not appear reasonably calculated to lead to discovery of admissible evidence" along with other reasons the motion to compel production was denied. Not everything is discoverable in Tax Court and relevancy is a key concern.

SANCTIONS/AWARD OF COSTS UNDER §6673(A)

If the taxpayer institutes proceedings primarily for delay, or his position is frivolous or groundless, or the taxpayer unreasonably fails to pursue available administrative remedies, the Court may require taxpayer to pay the United States a penalty not to exceed $25,000. The exact wording for the conduct that triggers the application of §6673(a)(2) is multiplying "… the proceedings in any case unreasonably and vexatiously."

A private attorney may be required to personally pay the excess costs, expenses and attorney's fees reasonably incurred because of such conduct. If the offender is a government attorney, the United States must pay such excess costs, expenses and attorney's fees in the same manner as an award by a district court.

A petitioner is not entitled to have frivolous arguments refuted with "somber reasoning and copious citation of precedent" (*Wnuck* (136 TC 24 (5/31/11)). Petitioner was hit with a $1,000 penalty under §6673 and filed a motion for reconsideration to vacate the decision. The Tax Court allowed the motion to vacate and found again for the respondent while increasing the penalty to $5,000.

Example: *Vincent Lorusso* (TC Memo 2018-3 (1/11/18)), a practicing attorney specializing in criminal law, moved to dismiss his case, seeking to withdraw his petition and respondent moved to impose a penalty against petitioner pursuant to §6673. He was informed he needed to submit various forms and file his 2014 return and proof that estimated payments were paid in full for the current year, in order to qualify for collection alternatives. He didn't submit any of the requested documents and didn't participate in the scheduled CDP hearing. He was given a "last chance" letter and additional time, and he still didn't respond. Since 2015 petitioner initiated 4 distinct cases with similar factual backgrounds. The Court noted that petitioner's history of litigation with the Court may merit imposition of a penalty, but respondent hasn't moved for one in the past and the Court hasn't issued petitioner a warning. So instead of the penalty, the Court warned petitioner that a penalty could be imposed if he returned to the Court and proceeded in a similar fashion in the future.

A petitioner who files a petition asking to review a collection action may have the option to withdraw the petition – the Court must look at whether the nonmoving party "will suffer clear legal prejudice." Since the respondent would only lose the opportunity to pursue the §6673(a)(1) penalty, which the Court decided not to impose, it granted the petitioner's motion to dismiss.

Example: *Ronald Byers* (TC Memo 2017-28 (2/6/17)) failed to file tax returns from 1999-2002. Respondent sent a notice of deficiency related to his Federal income and self-employment taxes and petitioner filed a petition in the Tax Court challenging the determination (he lost in 2007, and also lost in appeals at the 8th circuit in 2009). Petitioner didn't post a bond to stay assessment and collection, and on 5/12/08 respondent assessed the taxes, additions to tax and interest. A Notice of Federal Tax Lien was filed on 10/22/13 and petitioner timely filed Form 12153 requesting a CDP hearing. He didn't specify a collection alternative, but created and checked his own checkbox (labeled "Collection Alternative") requesting that the lien be subordinated, discharged or withdrawn because it was overly intrusive and unwarranted, and he requested a CDP hearing exclusively by correspondence. In order for the IRS to substitute other assets, petitioner had to provide specific info on the assets he wanted to substitute, and to provide Form 433-A (*Collection Information for Wage Earners and Self-Employed Individuals*) and to file signed returns for tax years 2008-2013. None of the information was provided, and on 9/26/14 the respondent issued a Notice of Determination sustaining the Notice of Federal Tax Lien Filing. No stranger to this Court, petitioner was hit with a $10,000 §6673 penalty for instituting and maintaining the proceeding for delay (he was previously hit with a $5,000 penalty).

MOTIONS

GENERAL INFORMATION (RULE 50)
A motion is a formal, written, captioned document requesting the Court take a specified action in the form of an order within the judge's discretion. Motions made during a hearing or trial can be orally stated, unless the Court directs otherwise.

Motions must spell out the grounds for the motion and what relief is sought. They must show that prior notice was given to opposing party and must state if there is objection. If no such statement is made, the Court will assume there is an objection. The rules applicable to captions, signing and other matters of form and style apply to motions, as do the general rules of service on parties.

The Court can take any procedural action it deems appropriate with respect to motions. It can grant or deny them or take the matter under advisement. In response to a motion, the Court may:

- require a written response from the parties,
- hold a hearing, usually in Washington D.C., **or**
- otherwise act at its own discretion under Rule 50(b).

Attendance at a hearing may not be required; if a motion is noticed for hearing, then a party to the motion may submit a written statement of the party's position with any supporting documents. The statement may be submitted in lieu of or in addition to attendance at the hearing.

Filing a motion is not cause for postponing the trial. Orders are not treated as precedent, except for res judicata, collateral estoppel or similar doctrine, or to establish law of the case.

FOR MORE DEFINITIVE STATEMENT (RULE 51)
This motion points out defects when a pleading requiring response is vague or ambiguous. These defects may be corrected upon filing the proper pleading.

TO STRIKE (RULE 52)
This motion is made before responding to a pleading. If no response is required, the motion is made within 30 days after service of the pleading or at the Court's initiative. If granted the motion allows the Court to strike from the record any insufficient claim, redundant, immaterial, frivolous, impertinent, or scandalous matter. The Court can also strike objectionable items from briefs, documents or other papers or responses filed with the Court.

TO DISMISS (RULE 53)
This motion requests the case be dismissed for cause upon motion of a party or by the Court's initiative.

TIMELY FILING AND JOINDER OF MOTIONS (RULE 54)
All motions must be made timely unless the Court permits otherwise. Motions are to be separately stated and are generally not joined together, except as permitted in this section, which includes 1) motions under Rules 51 and 52 related to the same pleading or other paper, and 2) motions under Rule 56 for review of a jeopardy assessment or levy, if the assessment/levy are the subject of the same written statement.

TO RESTRAIN ASSESSMENT/COLLECTION/ORDER REFUND (RULE 55)
A Rule 55 motion can be filed with the Court when the IRS attempts assessment and collection activity on a taxable year properly before the Court following the filing of a timely petition. Under §6213(a) Tax Court has jurisdiction to enter an order to enjoin assessment and collection. The taxpayer must file a Rule 55 motion with exhibits attached including all assessment and collection notices received. The Court can also order the IRS official responsible for effective abatement of the assessment and termination of collection to file a report on his actions.

MOTION FOR REVIEW OF JEOPARDY ASSESSMENT OR JEOPARDY LEVY (RULE 56)
Such motions are heard only on then-pending actions before the Court when the IRS makes a jeopardy assessment or levy concerning one or more taxable years involved in the case. The Tax Court has jurisdiction to review the appropriateness of the jeopardy action. The motion must be filed within 90 days of earlier of:

- the date the IRS notifies the taxpayer concerning their review (made at the taxpayer's request) of the assessment or levy, **or**
- the 16th day after the taxpayer requests that the IRS review the jeopardy assessment or levy.

Generally, hearings on these motions are held in the city designated for trial of the principal case.

MOTION FOR REVIEW OF PROPOSED SALE OF SEIZED PROPERTY (RULE 57)
Usually, the IRS may not sell seized property while a case is pending in Tax Court. When the IRS proposes to sell seized property to satisfy a jeopardy or termination assessment, the Court has jurisdiction to determine whether IRS has properly satisfied these three conditions:

- the taxpayer consents to the sale,
- expenses of conserving or maintaining the property will greatly reduce the proceeds, **and**
- the property is perishable.

The term 'perishable' connotes property that is subject to rapid, short-term decay or deterioration. In *Galusha* (95 TC 218 (1990)) the Court found that a $75,000 seized boat was not perishable, and thus could not be sold in this manner. The Court may rely on appraisals and other information to determine whether the property is indeed declining in value.

Once the taxpayer states plausible and believable grounds, the IRS bears the burden of proof of showing, by a preponderance of evidence, that its determination to sell the property is correct. Either party may file the motion. If the proposed sale is scheduled, either party must make the motion not less than 15 days before the date of the proposed sale and not more than 20 days after receiving a notice of sale. If the proposed sale is not scheduled, the IRS can file the motion at any time.

IN LIMINE

This pre-trial motion requests a hearing to exclude any reference to anticipated evidence that is claimed to be objectionable until the admissibility of the questionable evidence is determined. Its intended purpose is to bar opposing counsel from introducing particular evidence or evidence on particular subjects, and is most often used to keep prejudicial, irrelevant, or inadmissible items away from the jury's ears. It allows the moving party the opportunity to know if they must uncover rebuttal evidence. A favorable ruling can shorten the trial or reduce trial preparation. Even if not granted, a motion in limine can be useful to educate the Court on objections that will be raised. However, it also advises opposing counsel of the same information.

The Tax Court denies most of these motions as the judge sits without a jury and thus usually allows everything in with arguments on admissibility given at trial, but its use is increasing in Tax Court.

DE NOVO

This motion calls for a new hearing, offering a fresh start.

ADMISSIONS AND STIPULATIONS

ADMISSIONS (RULE 90)

Gilbert Law Dictionary defines admission as a "voluntary acknowledgement of the existence of facts which are usually favorable to an adversary." These are not limited to statements and may be inferred from conduct. An admission is not the same as a confession; its use here does not imply guilt.

Admissions are used by the Court to establish items that are not disputed so the time and effort necessary to prove them at trial is not needed. On any pending action, any party can serve a written request on any other party to assert the truth of any non-privileged, relevant matter. Requests for admissions cannot be made until 30 days after joinder of issue. These requests are self-executing after 30 days; all matters are deemed admitted if there is no timely response. The requesting party must advise the party to whom the request is directed of the consequences of failing to respond.

Anything admitted is conclusively established for the purpose of that trial only. Admissions are then the basis of stipulations.

STIPULATIONS (RULE 91)

The stipulation process is considered the "bedrock of Tax Court practice" and "acts as an aid to the more expeditious trial of cases." (*Branerton* 61 TC 691, 692 (1974)). They allow the Court to handle the volume of cases before it by narrowing controversies to their essential issues of dispute. Parties are required to stipulate to the highest possible extent all non-privileged, relevant matters. In other words, parties must stipulate all facts, all documents, and all evidence that fairly should not be disputed. The Court is not bound by stipulations that contain erroneous conclusions of the law and generally enforce stipulations unless "manifest injustice" would result (*Bokum* 992 F.2d 1132, 1135-1136 (11th Circuit 1993)).

The fact that any matter may have been obtained through discovery or requests for admission or other authorized procedures is not grounds for omitting the matter from stipulation. Those procedures are considered aids to stipulation; a failure to include a matter admitted under Rule 90 in the stipulation does not affect the Court's ability to consider the admitted matter.
A party can object on the grounds of prejudice or waste of time if the evidence would otherwise be excludable under the Federal Rules of Evidence. Otherwise, objections on grounds of materiality or relevance are noted, but are not grounds for refusal to stipulate as long as the truth is not disputed.

Stipulations must be written with all documents considered as part of the stipulation attached or filed with the stipulation. They should include all relevant facts, documents and papers, and all relevant matters obtained through discovery. Stipulations must be signed by counsel and are filed with the Court in duplicate with one set of exhibits.

They are treated as conclusive admissions unless otherwise permitted by the Court or agreed to by the parties. Permitting challenges to otherwise binding stipulations of fact undermines the stipulation process and injects uncertainty into the litigation process. A party cannot change, qualify or contradict a stipulation in any part unless the interests of justice so require. A party cannot be relieved of a stipulation even if it is contrary to law (*Korangy* (56 TC Memo (CCH) 989, (1989)), although the Court will relieve the taxpayer of the effects of a stipulation made as a result of a mistake of law.

Parties are required to stipulate to the highest possible extent
all non-privileged, relevant matters.
They must stipulate all facts, all documents,
and all evidence that fairly should not be disputed.

A fully stipulated case may be submitted under Rule 122 at any time. Typically, the judge assigns a brief schedule to the parties, and the case proceeds like others, except the record consists only of stipulated facts and exhibits without a trial transcript. A fully stipulated case does not change who has the burden of proof; the Court bases its decision solely on the record,

including admissions, depositions and stipulations although it may also require oral arguments or briefs.

If after a notice of trial is issued a party has refused or failed to confer with respect to entering into a stipulation, the party proposing to stipulate may move for an order directing the delinquent party to show cause why the matters should not be deemed admitted. The motion must be made not later than 45 days prior to the date set for calendar call. If no response is filed within the period specified, the matters are deemed stipulated for the pending case.

IDENTIFICATION AND CERTIFICATION OF ADMINISTRATIVE RECORD …. (RULE 93)

This new rule provides procedures for identification and certification of the administrative record in certain actions. It provides a uniform process governing the submission of the administrative record to the Court in certain actions where judicial review is normally limited to the administrative record and other relevant evidence as appropriate, including in whistleblower actions, collection review actions, and spousal relief disputes. The rule is normally not applicable to other actions, such as deficiency cases and interest abatement cases, although the Court may invoke the procedure in its discretion in appropriate circumstances.

PRETRIAL CONFERENCE (RULE 110)

There is no required pretrial conference in Tax Court, but in appropriate cases the Court will confer with the parties in pretrial conference to narrow issues, stipulate facts, simplify the presentation of evidence, or to otherwise assist in trial preparation or to possible disposition of the case in whole or in part without trial. The parties may request a conference either in writing or by a motion, or even with a telephone call to the judge's chambers in Washington, D.C. The Court, at its discretion, may hold pretrial conferences for cases whether they are calendared for trial or not. These conferences may be held in Washington D.C. or another convenient location, or by telephone. Pretrial conferences are not held in place of those required to comply with the stipulations (Rule 91) conferences, but they can assist the parties in entering into all the stipulations called for by that rule. No conferences will be held when the Court is satisfied the request is frivolous or made for the purpose of delay.

DECISION WITHOUT TRIAL

SUMMARY JUDGMENT (RULE 121)

This motion is useful when there is no genuine issue as to any material fact and the case can be decided as matter of law. Once the legal issues are decided, the entire case may end. Also, rulings on the legal issues can save the parties the time of discovering or producing certain matters at trial.

Either party may move, with or without supporting affidavits, for summary adjudication in the moving party's favor on any or all of the legal issues in controversy. Such a motion can be made at any time beginning 30 days after the pleadings are closed, but within such time as to not

delay the trial; in any event they must be filed no later than 60 days before the first day of the Court's session at which the case is calendared for trial.

The Court grants motions for summary judgment only rarely and cautiously, and they may be granted in full or partially. The IRS frequently obtains them when the taxpayer fails to respond to discovery requests, resulting in admissions. The Court should state on the record the reasons for granting or denying a motion for summary judgment.

The filing period begins 30 days after the pleadings are closed (joinder of issue) and ends at the point when resolution would delay the trial.

Rule 121 affidavits are made on personal knowledge and must be admissible in evidence, with sworn, certified copies attached. The adverse or opposing party cannot rest on mere allegations or denials of other party's pleading but must set forth specific facts to show there is a genuine issue for trial (Rule 121(d)). Failure to respond can lead to decision entered against that party.

Affidavits made in bad faith or for the purpose of delay may lead to sanctions and the offending party may be held in contempt and ordered to pay reasonable expenses of the opposing party, including counsel fees.

SUBMISSION WITHOUT TRIAL (RULE 122)

When sufficient facts were admitted, stipulated or established by deposition, the parties may submit a case at any time after joinder of issue. The burden of proof is not altered.

DEFAULT AND DISMISSAL (RULE 123)

If any party fails to plead or otherwise proceed as directed by the Tax Court Rules, or as required by the Court, that party may be held in default of the Court by motion of another party or by the Court's initiative. The Court can enter a decision against the defaulting party, using the terms and conditions the Court deems proper, or it may impose sanctions deemed appropriate.

The Court can dismiss a case at any time and enter a decision against the petitioner for his or her failure to properly prosecute or comply with the Tax Court's rules. The Court can also decide against any party any issue on which that party bears the burden of proof. That decision is treated as a dismissal.

If the defaulting party provides sufficient reason and files an appropriate and timely motion, the Court can set aside a default or dismissal, or the decision rendered by the Court on the default or dismissal. Any decision rendered on a default or as a result of a dismissal, other than for lack of jurisdiction, is generally treated as if the case was adjudicated on its merits. The order for dismissal becomes final at the expiration of the 90-day appeal period.

ALTERNATE DISPUTE RESOLUTION (RULE 124)

At any time after a case is at issue and before trial, the parties can make a motion to use **voluntary binding arbitration**. The Chief Judge will assign the case to a judge or Special Trial Judge to dispose of the motion and to supervise the arbitration. A stipulation must be attached to any motion that indicates what issues are to be resolved, an agreement among the parties to be bound by the arbitrator's decision, and the identity of the arbitrator, or how one will be selected and paid.

Once selected, arbitration is a contract between the parties. Without good cause, the Court will not set aside terms of an arbitration agreement. In *Duncan* ((121 TC 17 (11/24/03) the petitioner deadline was extended and petitioners continued to submit documents after the final deadline passed. The arbitrator refused to consider them – petitioners filed a motion to delay the arbitrator's findings because he should have asked them for information he felt was missing in his presentation.

The parties may move by joint or unopposed motion that any issue in controversy be resolved through **voluntary nonbinding mediation** under 124(b). The motion can be made at any time after a case is at issue and before the decision in the case is final. A judge or Special Trial Judge may act as mediator if the motion makes a specific request that one be designated, and the Chief Judge so designates the judge or Special Trial Judge.

However, the parties cannot be forced into arbitration. They may choose other voluntary disposition of the case, including mediation.

According to a panel at the Tax Court Judicial Conference held in March 2018, only a few arbitrations "were conducted during the past 20 years, as opposed to a more substantial number of mediations." That's why the name of Rule 124 was amended from Voluntary Binding Arbitration to Alternative Dispute Resolution.

CALENDARS AND CONTINUANCES

MOTIONS AND OTHER MATTERS (RULE 130)

If a hearing is to be held on a motion or other matter, apart from the trial, it may be held on a motion calendar in D.C. unless the Court directs otherwise. The Court may hear the matter ex parte if the other party fails to appear.

TRIAL CALENDARS (RULE 131)

When the case is at issue it is placed on a calendar for trial in accordance with Rule 140 and the Clerk notifies the parties of the place and time for which the calendar is set. To facilitate the orderly and efficient disposition of all cases on a trial calendar, a Standing Pretrial Order or other instructions for trial preparation are sent with the notice of trial, which is usually received about 5-6 months before the first day of the calendar. Unexcused failure to comply with the order may subject a party or the party's counsel to sanctions.

Standing Pretrial Order

A party is subject to sanctions for failing to comply with this order. These orders usually require the parties to begin settlement discussions, stipulate facts and evidence, and to exchange all non-stipulated documents (with the exception of impeachment documents) at least 21 days before calendar call. If a party fails to exchange a document, the Court may exclude evidence that has not been timely identified and exchanged between the parties (*Sunik* (TC Memo 2001-195, affirmed 2nd Circuit 321 F.3d 335 (2d Cir 2003)). Similarly, unidentified witnesses will not be permitted to testify at the trial without leave of the Court.

> Example: *Robert Rodriguez and Natalia Rodriguez* (TC Memo 2017-173 (9/6/17)) filed a joint return for 2012 that claimed $47,315 of car and truck expenses on P-H's law practice, among other expenses. Their home was about 65 miles from the office and .25 mile from the Stanislaus County Superior Court. At calendar call on 5/23/16 petitioner, for the first time, produced to respondent over 700 pages of documents including meal receipts, a mileage log, utility bills, car maintenance receipts, loan interest calculations and a residential lease. The mileage log totaled 35,087 miles, far less than the 83,256 miles reported on their Schedule C, and consisted only of dates and miles (no business purpose, no information about locations between which petitioners traveled, etc.). The standing pretrial order issued on 12/22/15 set forth the requirement that 1) parties enter into a stipulation of facts to be submitted at start of trial, and 2) any documents or materials a party expected to use must be identified in writing and exchanged by the parties at least 14 days before the first day of the trial session. It also noted that the Court may refuse to receive in evidence any document or material that is not so stipulated or exchanged "unless the parties have agreed otherwise or the Court so allows for good cause shown."
>
> Respondent objected to the admission of the documents at calendar call. One possible sanction for violating the 14 day rule is the exclusion of evidence that was not exchanged in accordance with that requirement. In weighing the appropriate sanction the Court considers whether the opposing party was prejudiced by the failure – in this case the Commissioner was prejudiced because the petitioners' records were full of errors (including reporting 129 business miles driven to the Court on Christmas day and a business meal on Valentine's Day that was with his wife) and the Commissioner had insufficient time to review them. Various petitioner exhibits were excluded.

The standing pretrial order requires that parties exchange all documents, except those for impeachment, not less than 21 days before calendar call.
Failure to do so may prevent a party from using the document.

Pretrial Documents
No later than 21 days before the first day of the trial session the parties are to file one of the following: a Proposed Stipulated Decision, a Pretrial Memorandum, a Motion to Dismiss for Lack of Prosecution, or a Status Report.

- If settlement has been reached, the Proposed Stipulated Decision must be electronically filed. If the parties reached a basis for settlement and need additional time to file the Proposed Stipulated Decision, a joint Status Report must be filed with a summary of the basis of settlement no later than 21 days before the first day of the trial session.

- If the basis for settlement hasn't been reached and it appears a trial is necessary, each party must file a Pretrial Memorandum to identify witnesses with a brief summary of their anticipated testimony (if they are not identified, witnesses will not be permitted to testify at trial without good cause. This also includes an estimate of trial time.

- If a party has been unresponsive and failed to cooperate in preparing the case for trial or resolution or to participate in preparing a Stipulation of Facts the opposing party will file a Motion to Dismiss for Lack of Prosecution.

No later than 14 days before the first day of the trial session the parties must file a Stipulation of Facts together with all stipulated documents. The documents and pages must be numbered for parties to identify documents and pages within the documents easily. With the exception of impeachment documents, all documents or materials that are not in the Stipulation of Facts must be marked and filed as Proposed Trial Exhibits.

A Status Report must be filed to inform the Court if the status of the case changes at any time before the trial date and after a Pretrial Memorandum, Motion to Dismiss for Lack of Prosecution, or Status Report is filed. If the case has settled, a Proposed Stipulated Decision may be filed. See below for more information about the Status Report.

MOTION FOR CONTINUANCE (RULE 133)
The Court may continue a case or matter scheduled on a calendar on motion or on its own. A motion for continuance must inform the Court of the position of the other parties with respect to the motion. Conflicting engagements of counsel or employment of counsel ordinarily won't be regarded as grounds for continuance. A motion for continuance filed 30 days or less before the date to which it is directed may be set for hearing on that date, but ordinarily will be deemed dilatory and denied unless the ground arose during that period or there was good reason for not making the motion sooner.

It is risky for counsel to not prepare for trial in hopes of obtaining a motion for continuance. Continuances cannot be used to judge-shop; the scheduled judge keeps jurisdiction.

TRIAL

Hearings are usually held in Washington D.C. They can be heard ex parte (between the judge and only one party) if the opposing counsel or party fails to appear. Trials may be heard in Washington D.C. or at any city location chosen by either the petitioner or the respondent.

FINAL STATUS REPORT

The Final Status Report form is a simple, fill-in-the-blanks form that a party should submit to the Tax Court and to the opposing party to report a settlement of a case not previously reported to the Court or to provide final estimates of the likelihood and/or length of trial not previously reported to the Court. A party should use the Final Status Report to inform the Court of any final changes in information reported in the party's Pretrial Memorandum.

The Court expects that the Final Status Report should be received by the Court during the last few business days before the first day of the trial session to ensure that the Court has the latest information; however, a Final Status Report may be submitted at any time earlier to report that a case has settled.

Submission of a Final Status Report does not (1) excuse a party from attending the calendar call without express permission from the judge assigned to the Trial Session; or (2) serve as a substitute for properly executed decision documents.

CALENDAR CALL

Calendar call generally is Monday morning at 10 a.m. for each calendar session scheduled. Each scheduled case is called and counsel provides the current status of the case and an estimate of time required for trial at that time. The Court may grant continuances upon motion or its own initiative, but good cause must be shown. Conflicting engagements of counsel or employment of new counsel are usually not regarded as grounds for continuance.

Motions filed 30 days or less prior to calendar call are usually deemed dilatory and denied, unless the grounds rose during that time and there was good reason for not making the motion sooner.

EXAM ALERT!

It's a good practice to visit calendar call if possible as part of your exam studies. You can find the Session Schedules at ustaxcourt.gov on the right side of the home screen (below taxpayer information, clinics and the historical analysis).

EVIDENCE

For Tax Court exam purposes, Evidence was once considered a part of Practice and Procedure. In 1996, it became a separate section of the Tax Court Examination. Most material relating to the topic is covered separately in the Evidence text but some material is duplicated in each text.

The Tax Court can issue rules of practice and procedure for its own proceedings, but it must apply the Federal Rules of Evidence (FRE) under Rule 143. The Court has authority to issue subpoenas to force the appearance and testimony of witnesses, and to force production of documents or things (see Forms at ustaxcourt.gov). The Court can also punish for contempt any misbehavior or disobedience to its orders. It can order foreign petitioners to produce relevant documents and it can request assistance from the U.S. marshals to carry out its orders.

At the request of any party, the Court can order witnesses be excluded from the trial. Some people cannot by excluded, including:

- a party who is a natural person (the petitioner),
- an officer or employee or other representative of a party that is not a natural person (such as a corporation), **and**
- any person whose presence is shown by a party to be essential to presentation of their case, including expert witnesses.

EVIDENCE (RULE 143)

IRC §7453 was amended by the PATH Act to specifically indicate that the Court will follow the Federal Rules of Evidence. Evidence that is relevant only to the issue of a party's entitlement to reasonable litigation or administrative costs can't be introduced during the trial of the case, unless the case is an action for administrative or litigation costs.

Testimony generally must be taken in open court except as provided by the Court. For good cause in compelling circumstances, with appropriate safeguards, the Court may permit testimony in open court by contemporaneous transmission from a different location. Ex parte statements and unadmitted allegations in pleadings do not constitute evidence.

Testimony taken by deposition is not treated as evidence until offered and received in evidence. Errors in the transcript of a deposition may be corrected by agreement of the parties or order of the Court.

A copy is admissible to the same extent as an original unless a genuine question in raised as to the authenticity of the original or in circumstances it would be unfair to admit the original. Exhibits may be disposed of as the court deems advisable. If a party wants the exhibit returned, an application must be paid within 90 days after the decision of the case became final.

Parties are ordinarily expected to make their own arrangements for interpreters, but the court may appoint one of its own selection.

Any party calling an expert witness must have the expert prepare a written report for submission to the Court and the opposing party. The Court will ordinarily not grant a request to permit an expert witness to testify without a written report where the expert witness's testimony is based on third-party contacts, comparable sales, statistical data, or other detailed, technical information.

SUBPOENA (RULE 147-148)
Subpoenas are all issued under seal of the Court. They are available from the Clerk of Tax Court, and on the Court's website (ustaxcourt.gov). Subpoenas can command the appearance of a person or production of documents or things. Service must be made by a U.S. marshal, or deputy marshal, or by any other nonparty who is at least 18 years old.

Unless the subpoena is used on behalf of the Commissioner, the party must also render one day's fee for attendance and mileage allowed by law.

TRIAL MECHANICS

As the petitioner normally bears the burden of proof, the taxpayer presents his or her case first. Petitioner and respondent each begin with an opening statement. All stipulations are filed with the Court. Witnesses for each party are presented with an opportunity for the opposing party to cross-examine them (see Evidence text for more information about this process).

RECORDS OF PROCEEDINGS (RULE 150)
Hearings and trials before the Court are recorded or otherwise report; transcripts are made if a permanent record is deemed appropriate by the presiding judge. Transcripts are supplied at charges as approved by the Court. Whenever witness testimony is recorded or otherwise reported it is admissible as evidence at a later trial or hearing and is proved by the transcript being duly certified by the person who reported the testimony.

BRIEFS (RULE 151)
Gilbert Law Dictionary defines a brief as "a concise statement of the facts of a case, relevant laws, and an argument which cites the reasons and authorities counsel will use to support his case."

Briefs are filed after trial or the submission of a case unless otherwise directed by the presiding judge who can permit or direct that oral argument be made in lieu of briefs. The judge can return any brief that fails to conform to the Rule's requirements. Briefs may be filed simultaneously or seriatim:

- **Simultaneous** requires that briefs for each party must be filed within 75 days after conclusion of trial, with answering briefs 45 days after. According to IRS counsel (Doreen Susi) at the Ali-ABA conference in February 2006, it is most common for simultaneous briefs to be used. Both petitioner and respondent have 75 days to file their opening brief – the Clerk will serve copies on the opposing side, although if a good relationship exists among counsel, they will be exchanged before the Clerk serves copies.
- **Seriatim** requires that an opening brief be filed within 75 days after conclusion of trial, the answering brief within 45 days, and the reply brief within 30 days after due date of the answering brief. According to Ms. Susi the respondent may request seriatim briefs if counsel feels the petitioner's brief will be poorly written or not submitted (which saves

IRS counsel some work).

A party who fails to file opening brief cannot file an answering or reply brief, except with leave granted by the Court. In *Craig Scheider* (TC Memo 2022-104 (10/12/22) petitioner was given the opportunity to set forth his objections to exhibits (his 2017 tax return according to the IRS and the IRS transcripts), but his failure to file a brief, even after being given additional time to prepare one, "forfeited his chance."

Briefs are generally in two parts: proposed findings of fact and legal arguments. The facts should be stated succinctly and should not repeat actual witness testimony; instead, the conclusion to be drawn from the testimony is best used. Legal arguments should be made clearly with on-point authorities. Citations should be kept to a minimum (no need to cite when the issue is factual). Remember that adverse authority must be disclosed in a brief.

Each brief is served on the opposing party, except with simultaneous briefs which are served by the Clerk after the corresponding brief has been filed. Delinquent briefs are not accepted unless accompanied by a motion setting forth acceptable reasons to account for the delay.

A signed original and an additional copy for each person to be served, must be filed. Only one transmission of an electronically filed brief is required.

No new issues or new approaches can be raised on brief.

> Example: *Willie Lewis and Barbara Lewis* (TC Memo 2017-117 (6/19/17)) claimed unreimbursed employee expenses for husband's minister work. They attached several exhibits to their briefs that were not already in the record. Reopening the record for the submission of additional evidence is at the Court's discretion, but the policy is the try all issues at one proceeding to avoid "piecemeal and protracted litigation." The Court declined to receive additional evidence.

Similarly, a party cannot leave some issues for the reply brief when the opposing party is disadvantaged by an inability to respond (*Hayden* 55 TC Memo (CCH) 1290, affirmed by the 6th Circuit in 1988).

The required format of a brief is stated in Tax Court Rule 151(e). To quote (now Senior) Judge Mary Cohen, 'briefs should be brief.' They should be concise and thorough even though many judges limit the number of pages in post-trial briefs. The brief is counsel's last opportunity to persuade the judge, so verification of citations, and correction of grammatical and spelling errors is essential.

New Rule 151.1 (3/20/23) provides procedures for filing an amicus curiae.

ORAL FINDINGS OF FACT OR OPINION (RULE 152)
Oral findings off act or opinion will be recorded in the transcript of the hearing or trial. A

Special Trial Judge may dispose of a whistleblower case by way of oral findings of fact or opinion.

DECISIONS

OPINION
A decision is the Court's final determination in a proceeding. A Tax Court decision may be stated orally, but it must be recorded in the transcript of the trial. The Tax Court can enter a decision:

- for the petitioner (the taxpayer wins), **or**
- for the respondent (the government wins), **or**
- by Rule 155 which indicates a split between the parties. Note the Court does not itself recompute the tax deficiency or liability but instructs the parties to do so. See Rule 155 Computation for more information.

In a deficiency action the decision is usually a statement of the amount of taxes owed by the petitioner, and which penalties apply to what extent.

Each opinion is considered to be the decision of the entire Tax Court, rather than that of the issuing judge. In this way the Court acts in the same collegiate manner as an appellate court. The court-review is not truly 'en banc' as the judges do not sit together to hear arguments.

The date of the Court's decision is the date the order is entered into the Tax Court records. The 90-day appeals period begins to run from the date the order is entered. A decision becomes final upon expiration of the time for filing a notice of appeal.

New matters cannot be brought up during the Rule 155 computations process, which is not intended to be one by which a party can raise for the first time previously unaddressed issues – a new issue will generally be an issue other than a purely mathematically generated computational item. If the matter was "neither placed in issue by the pleadings, addressed as an issue at trial, nor discussed by this Court in its prior opinion, that matter may not be raised in the context of a Rule 155 computation. In *Eaton Corporation and Subsidiaries* (153 TC 6 (10/28/19)) petitioner and respondent agreed on most issues related to transfer pricing, but the Commissioner was not allowed to raise penalties during the Rule 155 proceeding.

A draft opinion is prepared after the final reply brief is filed. Usually, the judge or trial judge who heard the case also prepares the draft opinion, but any other judge can prepare it. Draft opinions do not become opinions of the Tax Court until after review by the Chief Judge. The Chief Judge may choose within 30 days to have the whole Court consider the opinion, making it

a 'reviewed' opinion. All opinions reviewed by the entire Court are published in the Tax Court Reporter. The Chief Judge decides what other cases are published.

Proposed opinions are circulated in advance to give each judge the opportunity to do independent investigation and evaluation.

Review by the full Court is likely to happen if the draft opinion invalidates a regular opinion or overrules Tax Court precedent. If it is a case of first impression, the full Court may review the opinion. Reviewed opinions can also occur if the issue is likely to come up in another pending case, if the matter overrules a prior Tax Court decision, or if the Tax Court was previously reversed by a Court of Appeals. The Chief Judge selects a judge to write the reviewed opinion and the concurring or dissenting opinions follow the Court opinion.

Regular opinions are published in the Reports of the Tax Court. Memorandum opinions are published commercially. The Chief Judge determines which designation an opinion will have. Regular opinions are considered as binding precedent.

A memorandum opinion usually applies settled law to the facts and circumstances before the Court; they are not precedential, but the Court does not easily ignore them. Memorandum decisions can become even more important if they were subject to an appellate review. It is possible to cite a memorandum decision.

Summary opinions are those issued but not officially published (usually rendered in small tax cases). Opinions are also posted daily on the Court's website (ustaxcourt.gov). Remember that a summary opinion is not precedential and may not be cited.

A presiding judge may issue a bench opinion under Tax Court Rule 152 and §7459(b); these are not published or precedent for other cases, but can be used for res judicata, collateral estoppel, and law of the case. Bench opinions cannot be issued in actions for declaratory judgment or disclosure actions.

RULE 155 COMPUTATION

The entry of a decision can be withheld pending a final computation between the parties. Rule 155 computations can be on valuation issues or can indicate a split on multiple issues. If the parties agree on the amount of deficiency, liability or overpayment, they each submit a computation and a statement of agreement. Agreeing with a calculation does not waive appeal rights. Overpayments made by the petitioner must also show the date and amount of payment. The Court renders a decision when it receives an agreed Rule 155 computation.

If the parties do not agree either may file with the Court a computation of the amount believed to be in accordance with the Court's findings and conclusions. If there is an overpayment the computation must state the amount and date of each payment made by the petitioner. If the

parties submit computations that differ, they may be allowed the opportunity to be heard in argument and the Court will determine the correct amount.

No new issues can be raised at the hearing, which is held strictly on the question of correct computation. The calculation begins with the notice of deficiency from which the parties compute the redetermined deficiency on the basis of matters agreed to by the parties or determined by the Court.

No reconsideration can be requested, although pure issues of law may be reconsidered. Mechanical or math adjustments are permitted.

> Example: In *Estate of Sylvia Gore* (TC Memo 2007-370 (12/19/07)) the parties filed computations under Rule 155 that differed. The respondent's computation eliminated a $1.1 million gift tax deduction that had been allowed in calculating the estate tax deficiency – the petitioner argued this was raising a new issue. Respondent conceded he failed to recognize the error in the notice of deficiency and failed to plead an increased deficiency during the trial. The Court ruled that while the notice of deficiency serves as a starting point, the 155 computation must be computed on the basis of the matters decided by the Court. This case is of interest due to the discussion of how Rule 155 works.

POSTTRIAL PROCEEDINGS

HARMLESS ERROR (RULE 160)

No error is grounds for granting a new trial or for vacating, modifying or otherwise disturbing a decision unless the refusal to do so is inconsistent with substantial justice. The Court will otherwise disregard any error or defect that does not affect the substantial rights of the parties.

MOTION FOR RECONSIDERATION (RULE 161)

These must be filed within 30 days after written opinion or transcript with an orally stated decision is served. Generally, there must be a showing of unusual circumstances or substantial error to reconsider a decision. Mutual mistake or misunderstanding is not adequate grounds for reconsideration. Finding new evidence similarly is not sufficient for reconsideration (*Kenner,* affirmed by 7th Circuit 287 F.2d 689 (7th Circ 1968)). The motion may include a request for new or further trial but cannot be requested if the matters could have been advanced during the trial (*Westbrook* affirmed by 5th Circuit in 1995, 68 F.3d 868, 879-80).

MOTION TO VACATE OR REVISE (RULE 162)

These must be filed within 30 days unless otherwise permitted by the Court. The moving party must show by clear and convincing evidence that an intentional plan of deception designed to improperly influence the Court in its decision had just that effect on the Court - in other words, there must be fraud on the Court (*Stillman*, TC Memo 1995-591). The fraud can be perpetuated by petitioner's counsel; in *Gazi* (TC Memo 2007-342) the parties in the first tax case submitted a

stipulated decision document and then agreed the petitioners owed $219K in taxes and penalties of $376K. According to the petitioners that stipulation was executed without the petitioner's knowledge or authorization, and thus they should not owe the unpaid liabilities. They were permitted to substitute new counsel.

The motion can include a request for new or further trial.

> Example: *Jack Howard Taylor* (TC Memo 2017-212 (10/25/17)) filed a motion to vacate or revise the Court's decision that distributions were not excludable from gross income because they were retirement pensions determined by reference to petitioner's age or length of service or prior contributions. That decision was filed on 7/5/17 and on 8/8/17 petitioner filed a motion to vacate or revise the decision.
>
> Under Rule 162 any motion to vacate or revise a decision, with or without a new or further trial, must be filed within 30 days after a decision is entered, unless the Court otherwise permits. The decision to grant a motion to vacate lies within the Court's discretion. Motions to vacate are generally not granted without a showing of unusual circumstances, or substantial error, such as mistake, inadvertence, surprise, excusable neglect, newly discovered evidence, fraud or other reason justifying relief. Re-consideration is not the appropriate forum for rehashing previously rejected arguments or tendering new legal theories to reach the end result desired by the moving party. The motion was late, and the Court had discretion to accept the request for reconsideration, or not – nothing new was offered by petitioner.

Generally, once the Tax Court decision becomes final (90 days after the date the decision is entered) the Court no longer has jurisdiction to consider a motion to vacate its decision. The Court may vacate an original decision only if it lacked jurisdiction originally or if the original decision was obtained by fraud on the Court.

APPEALS (RULE 190)

Notice of an appeal is filed with the appropriate fee within 90 days after the decision is entered with the Tax Court Clerk. The Clerk prepares the record on appeal and forwards it to Court of Appeals.

Filing an appeal does not stay assessment or collection of a deficiency redetermined by the Court. The IRS can begin such activities 90 days after a decision is entered, unless the taxpayer files a bond with the Court in accordance with §7485. The bond is filed with the Court on or before filing the notice of appeal. The Tax Court sets the amount of the bond not exceeding double the amount of the portion of the deficiency in respect of which the notice of appeal is filed, and with surety approved by the Court.

A dismissal for lack of jurisdiction is appealable as a decision of the Tax Court. The date of the decision is the date the order is entered into the Court's record. If a petition is dismissed in part because it relates to a tax year or years for which there was no notice of deficiency, the order is not appealable (*Shepherd*, 147 F.3d 633 (7th Cir, 1998)).

The circuit where the petitioner legally resided when the petition was filed is where the appeal is heard.

SMALL TAX CASES (RULES 170-174)

The small tax case, also known as S case, was designed to provide the small taxpayer an opportunity to be heard in Court with as little formality, delay and expense as possible. In part to help unclog the backlog of cases then existing, the S status case became effective 1/1/69 with a $1,000 limitation on tax. Today the deficiency including additions to tax, penalties and additional amounts must not exceed $50,000:

- for any one taxable year, if income tax,
- for estate taxes in total,
- for total amount due in CDP determination,
- for total amount due in §6015 determination,
- for total amount of interest due in §6404 determination (cases pending as of 12/18/15),
- for any one calendar year, if gift tax, **or**
- for any taxable period if excise tax.

The taxpayer can pay down the deficiency to get an amount less than $50,000 to obtain S status, but the conceded amount must then be paid even if the taxpayer prevails on the remaining amount. In *Kallich* (89 TC 46 (1987)) the taxpayers sought to reduce deficiencies of $12,191, and $10,395 to $9,999 by petitioning only that amount to gain S case status under the then applicable $10,000 limitation. The Service's motion to remove small tax case designation was granted initially. Kallich moved to reinstate the small tax case and to amend the petition so the total in dispute was less than $10,000. The judge ruled that there was nothing in the statute to preclude a taxpayer from conceding a portion of a deficiency to qualify for small tax case status.

In *Leahy* (129 TC 8 (9/17/07)) the petitioner requested S case status even though the total unpaid liability on the collection issue exceeded $50,000. Their argument: they disputed less than $50,000 because they agreed to $20,000 of the underlying tax liability. The Court ruled that the total amount of "unpaid tax" cannot exceed $50,000 … the amount of the underlying tax liability in dispute is irrelevant.

The petitioner may request when filing the petition that his case be docketed as an S case or can ask for this status at any time before the trial commences. A taxpayer should elect S case procedure when:

- the amount in controversy is so small that it is not economical to obtain counsel (although taxpayer may be represented by counsel or may appear pro se),

- the lack of appeal rights is not harmful,
- the case depends on evidence that may not be admissible under regular rules, **or**
- speedy resolution is important to client (the Court attempts to schedule S cases for trial in 9 months).

IRS attorneys are generally encouraged to allocate minimal time to S cases, so a taxpayer may do better here than in regular court. However, if the issues revolve around a point of law, regular Tax Court proceedings should be considered to preserve appeal rights.

The Court may refuse to allow S status if the issue is important, the case has common issues with other pending cases, or the case involves an issue that establishes a principle of law applicable to other cases. The IRS may oppose S status if the issue may continue over a number of years for a petitioner (for example, to establish basis on a depreciable asset). If the IRS opposes the petitioner's request for S status a motion must be filed with the answer, unless the petitioner makes the request after the Answer was filed.

A case may be discontinued from S status at any time before the decision becomes final. The IRS may wish to remove a case from S status if the case is likely to be litigated often.
S cases are conducted in a much less formal manner than regular trials. Important differences include:

- no reply required, unless directed by Court,
- the proceedings are informal as much as possible,
- rules of evidence are relaxed,
- generally, no briefs required,
- no oral arguments (including opening/closing), unless requested by the Court on its own motion, or upon the request of either party,
- no transcripts are available,
- the decisions have no precedential value,
- there are no appeal rights,
- often heard by Special Trial Judge, **and**
- the judge may issue an oral bench decision after the trial.

If the taxpayer is appearing pro se, the judge is likely to assist the taxpayer during the trial.

Currently (as of 1/26/23) there are no small tax case procedures for a whistleblower or passport certification case, as noted in the accompanying explanation for Form 2 found on their website.

MEMORY TOOL – RITES BOPA $50K
Differences in S cases:

R – no **reply** required
I – **informal** proceedings
T – no **transcript**

E - relaxed **evidence** rules
S – **Special** Trial Judge usually

B – **bench** decision common
O – no **oral** arguments
P – no **precedential** value
A – no **appeal** rights

$50K limitation – per year (income, gift tax), event (CDP, estate, §6015, §6404), quarter (employment tax).

PARTNERSHIP JURISDICTION

Only partnerships that meet the small partnership exception are exempt from the rules found in §6221-§6233. A small partnership has 10 or less partners, each of whom must be a natural person (not a nonresident alien, estate or C corporation) and each partner's distributive share must be the same as every other partnership item. The Bipartisan Budget Act of 2015 (BBA) generally states that §§6221-6241 will apply to returns filed for partnership taxable years beginning after 12/31/17, but a section of the BBA allows a partnership to elect to apply those code sections for a partnership taxable year beginning on a day from 11/3/15 through 12/31/17.

FINAL PARTNERSHIP ADMINISTRATIVE ADJUSTMENT

In order for the IRS to collect tax from a partner attributable to a proposed adjustment to any partnership item, the IRS must first issue a notice of Final Partnership Administrative Adjustment (FPAA). When the appropriate person files the petition, the Court has jurisdiction to hear disputes involving all partnership items for the taxable year to which the FPAA relates, and to also make the proper allocation among the partners.

The FPAA should be issued at least 120 days after the IRS mails a notice of the beginning of a partnership administrative proceeding to all notice partners and to all 5% notice groups. A notice partner is every partner in a partnership with less than 101 partners or a partner with 1% or more profits interest in a partnership that has more than 100 partners.

A notice group is one formed for the purpose of initiating litigation. A notice group contains non-notice partners who collectively have at least a 5% profits interest; one partner in the group is selected to receive notice.

Any notice partner that does not receive a notice 120 days or more before the FPAA is issued can opt out of the entity proceeding. The FPAA remains valid except for the affected partners.

The FPAA must be mailed to the Tax Matters Partner (TMP). Within the next 60 days the IRS must also mail the FPAA to all notice partners and 5% notice groups that provide their names

and addresses to the IRS. The FPAA sent to partners other than the TMP usually show the date on which it was sent to the TMP; this is the date that starts running the petition time clock. When two FPAAs are issued to the same partnership for the same taxable year, the first is valid. If the taxpayer fails to file a petition within the 150-day period on the first FPAA, it cannot file a petition on the invalid second FPAA (*Wise Guys Holdings, LLC* (140 TC 8 (4/22/13)).
The last known address rules do not apply in partnerships the same as for individual taxpayers. It is sufficient for the IRS to send the FPAA to the address shown on return for the year at issue. An FPAA addressed to "'The Tax Matters Partner" and mailed to the partnership address is valid even if there is no TMP (*Chomp Associates*, 91 TC 1069 (1988)). It is irrelevant whether the TMP or notice partner actually receives the FPAA, as long as the IRS mailed it to the last known address.

TAX MATTERS PARTNER

The Tax Matters Partner (TMP) usually is the general partner designated by the partnership, but if no TMP is designated, the general partner with the largest profits interest at year's end is the TMP. If more than one partner has the largest profits interest, the designation is made alphabetically. Although the IRS has no statutory duty to do so, the Service can designate anyone, including a limited partner, to be TMP if no one else is so designated and it is impractical to use the 'largest share' rule. A person who is incompetent or has filed for bankruptcy cannot be TMP. Under Rule 250 the Court can appoint or remove a TMP. An FPAA is still valid even if there is no TMP when it is issued. Even if the partnership no longer exists when the FPAA is mailed, it remains valid.

In *Cinema 84, Richard M Greenberg TMP* (122 TC 13 (3/23/04)), a partner who did not participate in the Tax Court proceedings filed a motion for leave to vacate a decision and to be appointed the TMP. The case was dismissed for failure to properly prosecute because no partner appeared who would become the TMP. Even after the Court extended the time frame to appear, no one did. The Court ruled that absent fraud on the Court, there was no reason to vacate a final decision.

PARTNERSHIP ITEMS VS AFFECTED ITEMS

Partnership items are those that are more appropriately determined at the partnership level. A list can be found in Regs §301.6231(a)(3)-1, and includes such things as:

- items of income, gain, loss, deduction or credit of the partnership,
- items of the partnership that may be tax preference items under §57(a) for any partner,
- partnership liabilities, including determination of whether they are nonrecourse or recourse,
- guaranteed payments,
- contributions to the partnership, **and**
- distributions from the partnership.

Partnership items also include the accounting practices and the legal and factual determinations underlying the determining of the amount, timing, and characterization of

items of income, credit, gain, loss and so on. This includes the partnership's accounting method, taxable year, and inventory method, and whether partnership property is deductible or must be capitalized.

Partnership income is a partnership item under the tax benefit rule. A partner's amount at risk is not a partnership item, but is an affected item, one that is determined in part by reference to relevant partnership factors. Deficiency proceedings for affected items usually begin after the entity-level proceeding is complete. In fact, under TEFRA rules the Tax Court cannot hear disputes involving partnership items together with the partner's case on nonpartnership items (*Dionne*, 65 TC Memo 2182 (1993)). A statutory notice based on affected items cannot grant jurisdiction to the Court until the partnership proceedings are complete (*GAF Corp*, 114 TC 519 (2000)).

A taxpayer's bankruptcy petition converts partnership items into nonpartnership items, even if the taxpayer's partnership interest is held through an S corporation. Even if partnership proceedings are not yet completed, the Tax Court has jurisdiction over the individual partner.

STATUTE OF LIMITATIONS

The FPAA statute of limitations is three years from the later of the day the entity's return was filed or the date the return was due.

If the entity omits more than 25% of gross income from its return, the statute of limitations periods is six years from the later of the date the entity return was filed or the date it was due. If any partner participated in the preparation of a partnership return that includes a false or fraudulent item, there is no statute of limitations for that partner; for other partners the statute is six years from the later of the date the entity's return was filed or the date it was due.

The statute can be extended by agreement of the partner with respect to that partner. It can be extended for all partners by agreement between the TMP, or any other person authorized by the partnership to make this agreement, and the IRS. These agreements must be in writing. If an FPAA is issued beyond the statute date it is still valid for purposes of granting jurisdiction to the Tax Court. After the Court obtains jurisdiction, it then enters a determination of the case merits against the IRS.

JURISDICTION

The FPAA only gives the Tax Court jurisdiction over partnership items. A separate §6212 notice of deficiency must be issued to individual partners for related penalties. The IRS cannot issue a notice of deficiency to assert deficiencies attributable to an affected item until the final determination of the partnership items by those items are affected.

Under §6226, the proper person must file the petition for a partnership proceeding. Generally, this is the TMP, although under certain time frames another partner can file the petition. Within 90 days of the IRS mailing the FPAA, only the TMP can file a petition in Tax Court. If any

partner except the TMP files during this 90-day period, the petition is dismissed, unless the partner is acting for the TMP who agrees with his acts. If the TMP does not file a petition in 90 days, any notice partner, including the TMP, can file within the next 60 days (for a total 150 filing day period). If no notice partner files during this 60-day period, and one filed during the 90-day TMP-only period, the petition is treated as though it was filed on the last day of the 60-day period and goes forward.

PENALTIES AND INTEREST

Penalties and interest are discussed in both Practice & Procedure and Federal Taxation texts since exam questions and answers may be tested in either section. The text sections are the same, but the questions may vary.

INTEREST

A taxpayer generally must pay interest on tax underpayments beginning from the late day prescribed for payment and ending on the payment date. The interest rate is the federal short-term rate plus 3%, and interest is compounded daily. For large corporate underpayments (over $100,000), the rate is the federal short-term rate plus 5%.

A taxpayer can make a deposit under §6603 to suspend the running of interest on a potential underpayment; for example, if the taxpayer is under examination, or has a pending Tax Court deficiency case.

In addition, the §6654 individual estimated tax penalty is essentially an interest charge from the date of the required payment to the unextended due date of the tax return.

On the other hand, the IRS is generally required to pay interest on certain overpayments that are not promptly refunded to taxpayer. The interest rate is the federal short-term rate plus 3% (2% for corporations; 0.5% if corporate overpayment over $10,000), and interest is compounded daily.

The IRS may have to pay interest on an original return refund if the refund is not paid within 45 days after the unextended due date (if filed prior to that date) or 45 days after an original return or claim for refund is filed.

INTEREST ABATED

If an unreasonable error or delay by an IRS employee who is performing managerial or ministerial act created the interest, it can be abated. A ministerial act is a procedural or mechanical act, one that does not involve the exercise of judgment or discretion that occurs during the processing of a case after all the prerequisites take place.

Interest cannot be abated if the taxpayer or anyone related to taxpayer contributed significantly to the delay or error. An interest reduction can only be considered if the error or

delay occurs after the IRS contacts the taxpayer in writing; an audit notification letter is considered a contact in writing.

Only interest on income, estate, gift generations skipping, and some excise taxes qualifies.

Interest is suspended after eighteen months if the IRS does not send the taxpayer a deficiency notice within 18 months of the later of:

- the original due date of the return, **or**
- the date taxpayer timely files return.

Interest resumes 21 days after the IRS sends notice and demand for payment.

PENALTIES

While there is also a discussion of penalties in Practice and Procedure, they are mentioned here as well since they may be tested in that part of the exam. The IRS can levy civil penalties for violations of the tax law and they are used to encourage compliance. Generally, the IRS does not impose penalties if the taxpayer's failure to comply or omission is reasonable. Reasonable cause and good faith are determined on a case-by-case basis, taking into account all relevant facts.

Reasonable cause exists if the taxpayer exercised ordinary business care and prudence but nevertheless could not file or pay the tax when due. Willful neglect means a "conscious intentional failure or reckless indifference." The Court has found taxpayers not liable for the failure to file/failure to pay penalty where illness or family hardship effectively prevented timely filing of a tax return.

> Example: Barry Leonard Bulakites (TC Memo 2017-79 (5/1/17) is an insurance consultant whose clients are accountants, but he relied only on TurboTax when preparing his own returns which, according to the IRS, claimed a few too many deductions. He argued the software lured him into claiming deductions. Petitioner didn't turn over some evidence to the Respondent until the eve of trial, which he blamed on a flood in his home (which turned out to be three years before trial). That narrative affected the Court's view of his credibility. He was not allowed the increased alimony that he voluntarily paid (it must be subject to a decree of divorce or separate maintenance or a written instrument incident to such a decree), nor was he allowed interest deductions because he could not show that he made a payment AND show what portion was interest and what portion was repayment of principal (he made payments, but the payments didn't match the tax returns and the discrepancy was not explained). And of $185,673 "other expenses" he was permitted $142. Not surprisingly, despite his attempts to blame TurboTax for his mistakes, he was subject to accuracy related penalties. According to Judge Holmes, "tax preparation software is only as good as the information one inputs into it."

Reasonable cause includes:

- reliance on the advice of the IRS or a tax expert,
- irregularities in mail delivery,
- death or serious illness, **or**
- acts of war, casualty or disaster.

To reasonably rely on professional advice the adviser must be a competent pro, with sufficient expertise to justify the reliance, the taxpayer must provide necessary and accurate info, and the taxpayer must actually rely in good faith on the adviser's judgment.

In order for it to be reasonable reliance on a professional advice 1) the adviser must be a competent professional with sufficient expertise to justify the reliance, 2) the taxpayer must provide necessary and accurate information to the adviser, and 3) the taxpayer must actually rely in good faith on the adviser's judgment. The taxpayer has the burden of proving that his or her failure to comply was not willful and was reasonable under the facts and circumstances.

Under the *Boyle* Supreme Court decision (469 U.S. 241 (1985)), a taxpayer cannot use reliance on a tax professional as reasonable cause for a failure-to-file penalty if the taxpayer relied on the professional to file the return or extension. A taxpayer has a non-delegable duty to ensure their return (or an extension) is filed. However, it may be possible to use tax professional reliance as reasonable cause for non-filing if the tax professional provided advice on the filing requirement that the taxpayer relied on in good faith. In *Est. of Hake v. U.S.*, 2017 PTC 74 (M.D. Pa. 2017), a case which is appealable to the Third Circuit, a district court also rejected the IRS's reliance on *Boyle* and held that an estate was not liable for penalties for late filing of an estate tax return where the late filing was due to erroneous professional advice. This is an unsettled area of law

> Example: *Carolyn Whitsett* (TC Memo 2017-100 (6/1/17)) a 70-year-old physician specializing in blood transfusions. She and her then husband purchased 4000 shares of stock for $11,000 in 1982 that she was given in their divorce in 1998. In July 2011, an offer was made of $27 per share – she then owned 63,594 shares – and she advised her longtime tax preparer that she would accept the offer. The check was dated 1/4/12, but it was accompanied with a document that showed a "payment date" as 8/19/11, and the preparer put the stock transaction on the 2011 return, which was apparently never efiled. She made payments based upon his erroneous calculation on the long-term capital gains of just over $1,070,000. In 2013 petitioner received Form 1099-B showing the gross proceeds of $1,717,038 and a sale date of 1/4/12 – the tax preparer determined no tax was due because the sale had been reported in 2011. Notices were sent by IRS and forwarded to the tax preparer until petitioner became alarmed enough to obtain new counsel and a 2011 return was prepared requesting that the

overpayment be applied to 2012. The parties stipulated that petitioner is liable for a deficiency for 2012, but disagree about imposition of the 20% accuracy related penalty.

While taxpayer is a highly education person and skilled physician, she had no knowledge of Federal income taxation. Although her preparer was not a CPA, she assumed he was because he was a member of several accounting societies. Errors made by the preparer cannot be used retroactively to demonstrate the adviser's lack of competence – he had 25 years' experience and she had a long-standing history of relying on him. Petitioner gave him all the facts she knew and all the forms she received, and her reliance was reasonable. She was not subject to the accuracy related penalty.

MEMORY TOOL - CAR
Reasonable reliance on a tax professional for penalty relief elements.

CAR
C - Competent professional
A - All information (accurate and relevant) provided
R - Relied in good faith on the adviser's judgment

Not all penalties are jurisdictional.
If the tax is not subject to the deficiency notice requirements of §6212,
the Tax Court does not have jurisdiction over the penalty
unless it comes through a CDP hearing review.

FAILURE TO FILE-6651(A)(1)/FAILURE TO PAY - §6651(A)(2)
When included in a notice of deficiency, the Tax Court has authority to redetermine these penalties. Failure to file penalty is 5% of the tax due as shown on the return for the first month and an additional 5% for each month, or part of month, the failure continues, not to exceed 25%. If the late filing is due to fraud the penalty increases to 15% per month (or part of a month) up to a maximum of 75% (§6651(f)).

Failure to pay penalty is .5% of the amount shown for each month, or part a month, the taxpayer does not pay the tax, not to exceed 25%. If the IRS issues a notice of intent to levy, the penalty increases to 1% per month, not to exceed 25%.

If both are owed at the same time, a maximum of 5% is charged.

Taxpayer cannot reasonably rely on a separated spouse to file for an extension or file the return and avoid a failure to file penalty. *James Plato* (TC Memo 2018-7 (1/24/18)) separated from his wife in 12/07 and they have not lived together since. Petitioner prepared and signed Form 1040 for 2007 reporting filing status of MFJ and tax liability of $46,073 – he left the joint return

and a check for $46,073 "under the mat at the front door" of his wife's residence for her to sign and mail to the IRS. The check was never negotiated and the return was not mailed. Petitioner didn't request an extension of time but he asked his wife to request the extension. The IRS prepared an SFR for 2007 and after the notice of deficiency (dated 5/5/14) petitioner submitted Form 1040 for 2007 and tendered a payment of $43,490 with the separate return. Petitioner argued that his attempt to file the joint return coupled with his history of compliance amount to reasonable cause for his failure to file the return, but petitioner did not do everything possible to see that the return was filed with the IRS. He took no further action once he asked his wife to handle the details. The Court has held that the failure to obtain a spouse's signature on an MFJ return when the couple is separated doesn't always constitute reasonable cause for failure to file a tax return.

ACCURACY-RELATED PENALTIES- §6662

Accuracy-related penalties may apply when any part of the underpayment is:

- due to negligence or a disregard of the rules and regulations, but not with the intent to defraud under §6662(c),
- attributable to a substantial understatement of income tax, self-employment tax, or unrelated business income tax under §6662(d),
- attributable to a substantial misstatement of value, including those for income, gift and estate tax valuations under §6662(h), **or**
- attributable to overstating pension liabilities under §6662(f).

"Negligence" includes any failure to make a reasonable attempt to comply with the law, including a failure to keep adequate books and records or to make reasonable inquiry into the correctness of a deduction, credit or exclusion that seems "too good to be true." "Disregard" includes any careless, reckless or intentional disregard of the law.

When included in a notice of deficiency, the Tax Court has authority to redetermine these penalties.

Negligence §6662(c)

The penalty for negligence or disregard of the rules and regulations, but without the intent to defraud, is 20% of the portion of the underpayment attributable to negligence.

A position with a reasonable basis that is adequately disclosed (which can be done with Form 8275, *Disclosure Statement*) is not treated as attributable to negligence. If the taxpayer's position is contrary to a revenue ruling or notice published in the Internal Revenue Bulletin, it must have a realistic possibility of being sustained on its merits to avoid the negligence penalty. "Reasonable basis" is less stringent than "realistic possibility."

Substantial Understatement §6662(d)
A 20% penalty is imposed on any portion of an underpayment of tax that is attributable to any substantial understatement of income tax, self-employment tax, or unrelated business income tax. An understatement is substantial if it exceeds the greater of:

- 10% of the tax required to be shown on the return, or
- $5,000 ($10,000 for corporations other than S corporations and personal holding companies).

TCJA reduced the one prong of the penalty threshold to 5% of the tax required to be shown for any return claiming a §199A deduction. For example, under the normal rule, a taxpayer with $60,000 of tax required to be shown on the return would be subject to §6662(d) with a $6,000 understatement; however, now, if the taxpayer takes a §199A deduction, the penalty is triggered with a $5,000 understatement.

The penalty is reduced to the extent it is attributable to any item for which there is or was substantial authority, or the relevant facts are disclosed on the return or on Form 8275, and there is a reasonable basis for the taxpayer's treatment. Relevant factors include the taxpayer's efforts to assess the property tax liability, including their reasonable and good faith reliance on the advice of a tax professional. Blind reliance on a tax professional is not reasonable.

Substantial Authority
Substantial authority exists if the weight of the authorities supporting the treatment is substantial in relation to the weight of the authorities supporting contrary positions under the appropriate facts and circumstances. Under §1.6662-4(d)(3)(iii) substantial authority includes the Internal Revenue Code and other statutory provisions, proposed, temporary and final regulations construing those statutes, revenue rulings and revenue procedures, tax treaties and regulations, Treasury Department and other official explanations of such treaties, court cases, congressional intent as reflected in committee reports, joint explanatory statements of managers included in conference committee reports, private letter rulings and technical advice memoranda, general counsel memorandum, IRS information on press releases, and notices, announcements and other administrative pronouncements publishes by the Service in the Internal Revenue Bulletin. Conclusions reached in treatises, legal periodicals, legal opinions or opinions rendered by tax professionals are not authority. An authority stops being an authority to the extent it is overruled or modified by a body with the power to overrule or modify the earlier authority. The type of document is considered so a revenue ruling would have more weight than a private letter ruling addressing the same issue.

A Tax Court opinion is not considered overruled or modified by a court of appeals to which the taxpayer does not have a right of appeal, unless the Tax Court adopts the holding of that court of appeals.

Substantial authority exists if the weight of the authorities that support the treatment is substantial in relation to the weight of the authorities supporting contrary opinions, under the appropriate facts and circumstances.

Substantial Understatement §6662(h)
For income tax purposes, §6662(b)(3) imposes a substantial valuation misstatement penalty of 20% if the claimed value is 150% or more of the actual value.

> Example: For $100,000 of actual value, the penalty would apply if the claimed value was $250,000 or more.

However, a gross valuation misstatement penalty of 40% applies when the claimed value is 200% or more of the actual value under §6662(h).

> Example: For $100,000 of actual value, the penalty would apply if the claimed value was $300,000 or more.

When there is a gross valuation misstatement in a partnership, it is determined at the partnership level. The gross valuation misstatement penalty applies when the Tax Court determines that an underpayment stems from deductions or credits that are disallowed because a transaction lacks economic substance or a participant is a sham (but there is a split in the Courts of Appeal, according to *Blak Investments, et al* (TC Memo 2012-273 (9/25/12))).

FRAUD §6663
Civil fraud penalties can be asserted when there is clear and convincing evidence (a higher standard than more likely than not) to indicate that some part of an underpayment of tax is due to civil fraud. This evidence must show the taxpayer's intent to evade the payment of tax that the taxpayer believed was owed. Intent is distinguished from inadvertence, reliance on incorrect technical advice, honest difference of opinion, negligence or carelessness.

The IRS must show the taxpayer knew the content of the tax return was false, and that he or she made the return with the intent to evade tax. To make this determination, the Tax Court generally evaluates whether certain "badges of fraud" exist and to what extent they exist. Internal Revenue Manual 25.1.6.4 (6-10-2021) lists the following common badges of fraud:

- Understatement of income (e.g., omissions of specific items or entire sources of income, failure to report substantial amounts of income received)
- Fictitious or improper deductions (e.g., overstatement of deductions, personal items deducted as business expenses)
- Accounting irregularities (e.g., two sets of books, false entries on documents)

- Obstructive actions of the taxpayer (e.g., false statements, destruction of records, transfer of assets, failure to cooperate with the examiner, concealment of assets)
- A consistent pattern over several years of underreporting taxable income
- Implausible or inconsistent explanations of behavior
- Engaging in illegal activities (e.g., drug dealing), or attempting to conceal illegal activities
- Inadequate records
- Dealing in cash, and
- Failure to file returns.

The civil fraud penalty is 75% of the portion of any underpayment that is attributable to fraud. The IRS may only impose this penalty if a tax return is filed.

On a joint return the civil fraud penalty does not apply to a spouse unless some part of the underpayment is due to civil fraud on the part of that spouse (IRC §6663(c)). When spouses file separate returns then amend to a joint return, any fraud on either separate return is deemed to be fraud on the joint return.

The civil fraud penalty is not asserted for failure to file a return or for a late-filed return. The fraudulent failure to file penalty under §6651(f) was added by OBRA 89 for this purpose.

The civil fraud penalty cannot be asserted on the same underpayment, or portion of an underpayment, to which the accuracy-related penalties are asserted under §6662. Only one penalty can be applied to any portion of an underpayment of tax.

When included in a notice of deficiency, the Tax Court has authority to redetermine these penalties.

> Example: *Michael Kohn and Catherine Kohn* (TC Memo 2017-159 (8/14/17)) the petitioner W is a practicing attorney, admitted to the Tax Court bar. Petitioner H is also an attorney who was convicted in 2002 of one count of violating §7212 for obstructing the administration of the internal revenue laws by creating fictitious debenture transactions to reduce clients' Federal income tax and crafting fee arrangements based on tax reduction. They timely filed their 1991 federal return which did not report cancellation of indebtedness income or any capital gains. Their 1992 return claimed a $121,000 casualty loss for dock units (in a presidentially declared disaster area, but they were purchased for $144,000 and sold for $142,000 without any improvements, which the Court felt reflected fair market value immediately before and after the casualty). By 1994 respondent commenced an audit of both returns and the notice of deficiency was issued on 6/27/96 reflecting many adjustments to those returns. In an amendment to his answer, respondent conceded the §6662(a) accuracy-related penalty for 1992 and instead asserted that petitioners were liable for a §6663 fraud penalty.

For fraud, the respondent bears burden of proof by clear and convincing evidence that an 1) underpayment of tax exists, and 2) some portion of the underpayment is due to fraud. Clear and convincing is "that measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established. It is immediate, being more than a mere preponderance, but not to the extent of such certainty as is required beyond a reasonable doubt as in criminal cases. It does not mean clear and unequivocal." Fraud does not include negligence, carelessness, misunderstand, or unintentional understatement of income. Fraud is a question that must be resolved upon consideration of the entire record, and it is typically proved by circumstantial evidence. The Court noted that this is one of the rare instances where fraud is established in the first instance by direct, not circumstantial, proof – they knew that the docks they were claiming as worthless would be sold in a matter of weeks for approximately what they had paid for them. Indeed, they signed the contract to sell the docks for $142,000 on 10/4/93, and signed their 1992 return 10 days later where they took the position that the docks had become worthless during 1993, giving rise to a loss deductible for 1992.

§6663(b) provides that if any portion of an underpayment is attributable to fraud, the entire underpayment is treated as attributable to fraud unless the taxpayer establishes by a preponderance of the evidence that some portion of the underpayment is not attributable to fraud.

PREPARER PENALTIES §6694-95

An income tax preparer can be subject to penalties for:

- understating tax liability due to a position with no realistic possibility of being sustained on its merits under §6694(a) – penalty of the greater of $1,000 per return or 50% of the income derived from the return – or under §6694(b) – penalty of the greater of $5,000 per return or 50% of the income derived from the return, for understatement of tax caused by the preparer's reckless or intentional disregard of the rules or regulations, **or**
- failure to give a taxpayer a copy of the return, or sign a return, or retain a copy of a return, or file correct information returns under §6695 (various penalties apply).

The Tax Court has no direct jurisdiction over these penalties; however, liability for these penalties can be considered by the Tax Court via a CDP hearing if the requirements for the underlying liabilities to be at issue are met.

RESPONSIBLE PERSON PENALTY - §6672

This civil trust fund recovery penalty is 100% of the total trust fund taxes (payroll taxes) evaded or not accounted for and paid over. The Tax Court has no jurisdiction over this penalty, but they do have jurisdiction over CDP hearings on §6672.

FRIVOLOUS RETURN - §6702

A penalty of $5,000 applies to frivolous returns. The frivolous return penalty applies where three conditions are met: 1) the taxpayer must have filed a document that "purports to be a return of tax imposed" by Title 26, 2) the purported return must be a document that either doesn't contain information on which the substantial correctness of the self-assessment may be judged, or on its face indicates the self-assessment is substantially incorrect, and 3) taxpayer's conduct must either be based on a position that the Secretary has identified as frivolous, or must reflect a desire to delay or impede the administration of Federal tax laws. If the taxpayer files a frivolous return he can be penalized even if he was not required to file a return or owes no tax for the year in question.

These are assessable penalties that are not subject to deficiency procedures, so no notice of deficiency can be issued for this liability.

TAX SHELTER - §6707A

75% of the decrease in tax shown on the return as a result of engaging in a tax shelter is the penalty, with a maximum $100,000 for a natural person ($200,000 not for natural person). If it relates to a reportable transaction, the penalty is $10,000 for a natural person (or $50,000 for a non-natural person). The reportable transaction must be disclosed on Form 8886, *Reportable Transaction Disclosure Statement*.

§6707A penalties are not subject to deficiency procedures and the Tax Court does not have jurisdiction except through a CDP hearing.

ADMINISTRATIVE WAIVER - §6751(b)

"No penalty under this title shall be assessed unless the initial determination of such assessment is personally approved (in writing) by the immediate supervisor of the individual making such determination or such higher level official as the Secretary may designate." This does not apply to penalties under §§6651, 6654, and 6655 as well as automatically generated penalties. IRS has burden of production to show §6751(b) compliance in Tax Court or the penalty will not be upheld.

There are three Tax Court cases related to *Lawrence and Lorna Graev* (2013, 2016 and 2017) and the issue of §6751(b) and when supervisory approval must be obtained for penalties. Taxpayers deducted cash and noncash charitable contributions that were disallowed resulting in large deficiencies for 2004 and 2005. In TC 140 23 (12/20/17) the respondent conceded the 40% penalties after the petition and answer were filed, then amended his answer to reassert the 20% penalty for the noncash contribution and for the first time asserted 20% §6662(a) accuracy-related penalties related to disallowance of a cash contribution deduction. The penalties were approved in writing by the immediate supervisor. It all comes down to timing – when must the written approval be obtained? In *Chai v Commissioner* (2d Cir 2017) the 2nd Circuit Court held that it must be determined no later than 1) the date the IRS issues the notice of deficiency, or 2) files an answer or amended answer, asserting such penalty. Taking Chai into

account, the Tax Court concluded that §6751(b) does not bar assessment of the accuracy-related penalties.

Legislative history makes it clear that §6751(b)(1) is intended to prevent the IRS from improperly using penalties that are within its power to determine in order to coerce settlements. The Tax Court is not mentioned in §6751 or its legislative history - §6673(a)(1) is designed to deter bad behavior in litigation before the Tax Court, and to conserve judicial resources, not to restrain the Tax Court (*Benton Williams* (151 TC 1 (7/3/18))).

Respondent must show that written supervisory approval was obtained before the first formal communication to the taxpayers of the initial determination to assess penalties in *James Clay and Audrey Osceola* (152 TC 13 (4/24/19)). For purposes of §6751(b) the Revenue Agent Report and the 30-day letter, to which the RAR was attached, constitute the first formal communication of the initial determination to assess penalties. However, some Circuit Courts of Appeals have taken positions more friendly to the government on when the initial determination must be made.

No supervisory penalty of a penalty under §6699 for an S corporation late filing penalty is required for §6751(b) purposes in *ATL & Sons Holdings, Inc* (152 TC 8 (3/13/19)).

The IRS can generate "automatically calculated through electronic means" penalties, which are exempted from the written supervisory approval requirement under §6751(b) in *Craig Walquist and Maria Walquist* (152 TC 3 (2/25/19)).

There is no requirement that the initial determination of all penalties be made at the same time or by the same individual for §6751(b) purposes in *Palmolive Building Investors, LLC* (152 TC 4 (2/28/19)). When the IRS asserts multiple penalties, under §6751(b) they are not required to be made by the same person at the same time or even that supervisory approval be made on a particular form.

A Letter 1087 and summary report of the Exam Division's tentative proposed adjustments is not the "initial determination" of a penalty in *Belair Woods, LLC* (154 TC 1 (1/6/20)).

§6751(b)(1) does apply to Trust Fund Recovery Penalties in *David Chadwick* (154 TC 5 (1/21/20)), despite a district court's finding in 2014 that §6751(b)(1) doesn't apply to TRFP. Letter 1153, Trust Fund Penalty Letter, notifies taxpayer of respondent's determination to assess the TFRP and supervisory approval is required before this is sent to the taxpayer.

IRS bears the initial burden of production under §7491 to offer evidence of compliance with the §6751(b)(1) compliance and that the individual initially determining accuracy-related penalties obtain written supervisory approval in *Charles L Frost* (154 TC 2 (1/7/20)). Once respondent satisfies the initial burden of production under §7491(c), petitioner must come forward with contradictory evidence suggesting that respondent's agent didn't comply with §6751(b)(1).

The written supervisory approval requirement of §6751(b)(1) applies to the §6707A penalty in *Laidlaw's Harley Davidson Sales, Inc* (154 TC 4 (1/16/20) when a corporation failed to disclosed a listed transaction on its corporate tax return.

> **NOTE: In April 2023, the IRS issued proposed regulations to standardize the application of §6751(b) nationwide since some circuits have taken positions contrary to the Tax Court.**

CRIMINAL TAX EVASION - §7201

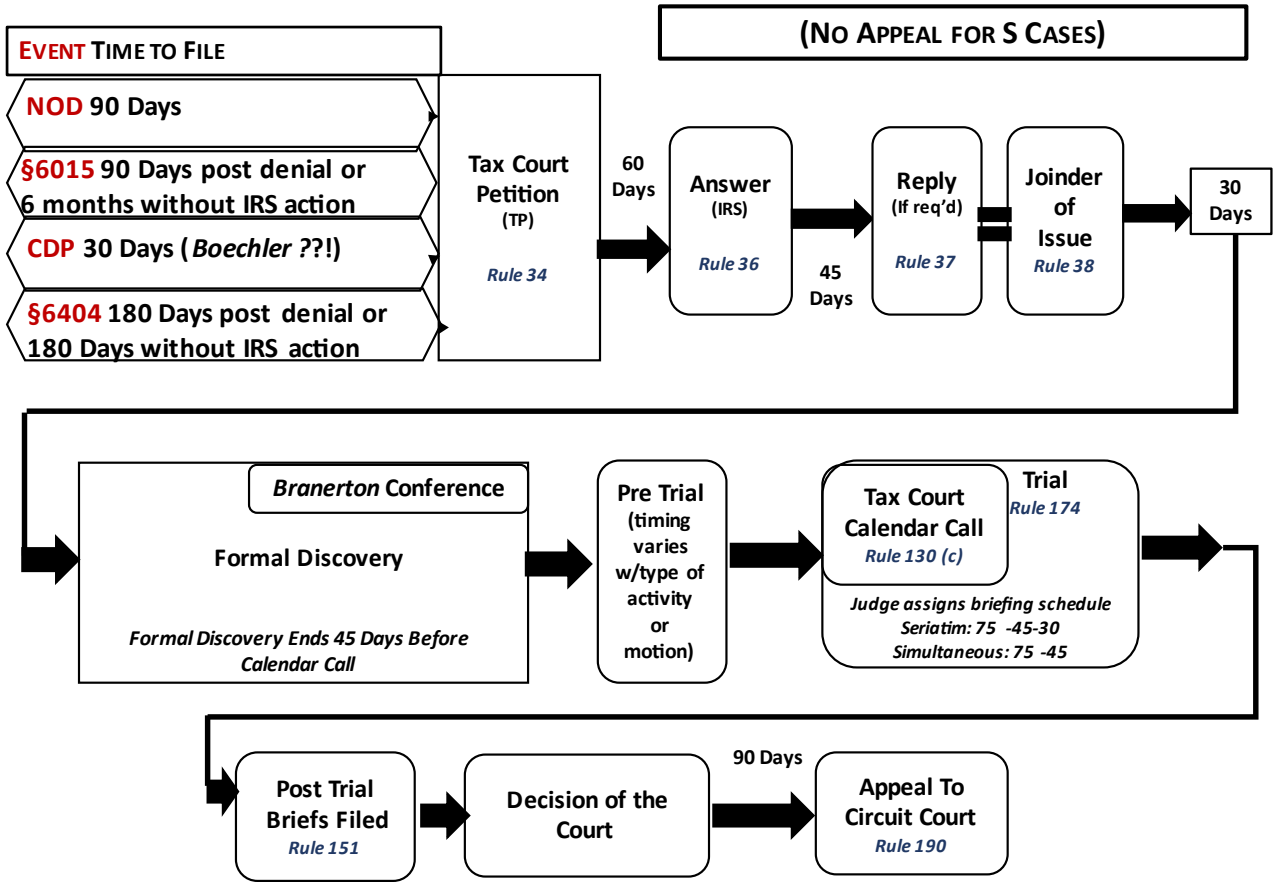
Willful attempt to evade tax is a penalty with a maximum penalty of $250,000 (for an individual, $500,000 for a corporation and/or up to 5 years in prison.

FORM 5471 PENALTY UNDER §6038, §6046

Information reporting requirements are imposed under §6038(a)(1) on any US person who controls a foreign corporation, which is when he or she owns or constructively owns stock that is more than 50% of the total combined voting power or total value of all classes of stock. §6046 requires information reporting by each US citizen or resident who is at any time an officer or director of a foreign corporation where more than 10% (by vote or value) of stock is owned by a US person. The penalty for failure to file a complete and timely 5471, *Information Return of US Persons with Respect to Certain Foreign Corporations*, is $10,000 per annual accounting period and there are additional penalties once the Secretary notifies the taxpayer of the requirement. The Tax Court has jurisdiction over CDP hearings related to these penalties.

> **NOTE: According to the *Farhy* decision (160 TC 6, *Alon Farhy*, (4/3/23), the IRS does not have statutory authority to assess penalties provided by §6038(b). This could be as big an issue for the IRS as §6751(b).**

APPENDIX B TIMELINE TAX COURT CASE



APPENDIX C SAMPLE STANDING PRETRIAL NOTICE

BIBLIOGRAPHY

Ali-ABA Course of Study Materials, Volume I and II, How to Handle a Tax Controversy at the Restructured IRS and in Court, presented 2/21-22/02 in San Francisco, CA, presented 6/10-11/04 in Boston, MA, presented 2/9-2/10/06 in Scottsdale, AZ and presented 6/12-13/08 in Chicago, IL.

Degen, Frank (EA, USTCP), "Urban Legend: A Disclosure on a Tax Return is an Audit Flag", EA Journal, May-June 2014, p 13-15.

Gilbert Law Summaries, Law Dictionary, Harcourt Brace and Company, 1997.

Levine, Peyser and Smith, Portfolio 630-2nd T.M., Tax Court Litigation, Bureau of National Affairs, Inc., 2000.

Levine, Peyser and Smith, Portfolio 630-3rd T.M., Tax Court Litigation, Bureau of National Affairs, Inc., 2003.

Tax Court Rules of Practice & Procedure, U.S. Government Printing Office (available on the web at www.ustaxcourt.gov).

Tax Court Judicial Conference, Chicago, IL, 3/26-3/28/18

Taylor, Simonson, Winter, Seery, Tax Court Practice, 8th Edition, American Law Institute, American Bar Association, 1993.