

Practicing Before the U.S. Tax Court

By Derek Hatch, Esq. and Szu-Ju Chang, Esq.

Unbeknownst to most attorneys, over 70% of United States Tax Court petitions are filed by pro se taxpayers, and they are often confused and overwhelmed with the litigation process. Practicing before the tax court can be intimidating; however, attorneys can learn how to assist pro se taxpayers by working with experienced tax attorneys. In this article, we want to provide a glimpse of how you could practice before the U.S. Tax Court, and our goal is to pique your interest into taking a pro bono tax court case in the future.

The United States Tax Court is a specialty court established by Congress under Article I of the U.S. Constitution. The tax court's jurisdiction allows taxpayers to dispute their tax deficiency before paying any disputed amount, as opposed to the U.S. district courts and the Court of Federal Claims

which require payment of the deficiency and filing suit for refund. The tax court's jurisdiction also includes the authority to redetermine transferee liability, make certain types of declaratory judgments, redetermine worker classification, determine relief from joint and several liability on a joint return (i.e., innocent spouse relief), review certain collection actions, award administrative and litigation costs, order abatement of interest, adjust partnership items, and review awards to whistleblowers who provide information to the Internal Revenue Service (IRS).

Currently, the tax court sits in 74 cities throughout the United States. Unlike the majority of the federal and state courts, and although physically located in Washington, D.C., 16 Judges, ten Senior Judges, and five Special Trial Judges alternate and preside in various designated cities during each tax court session.

To enter into an appearance for your client in tax court, you first need to be admitted to practice before the court. The application process is fast and simple. An attorney who is licensed to practice law must file Form 30, Application for Admission to Practice; a current court certification of good

standing; and a \$35 application fee to the admission clerk of the tax court. Certainly, there are circumstances where you could settle your client's case without entering an appearance for your client.

A signed Form 2848, Power of Attorney and Declaration of Representative (POA) gives an attorney authority to represent clients before the IRS. The authority under a POA also includes negotiating clients' cases with the IRS Chief Counsel and Office of Appeals (Appeals) and accessing clients' tax transcripts on the

IRS Transcript Delivery Service. Although attorneys may communicate with the IRS Chief Counsel through a fully executed POA, petitioners are still considered unrepresented in tax court for purposes of the tax court rules unless the attorney has formally filed an entry of appearance in the case. Thus, an attorney

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who has not entered an appearance does not have the authority, for example, to bind the petitioner to a stipulation of facts or stipulated decision, sign court documents such as a motion for continuance, or to communicate with the court on the petitioner's behalf. Nonetheless, because the Office of Chief Counsel recognizes the significant assistance pro bono representatives provide to pro se taxpayers, both the court and Chief Counsel's Office expect and encourage the IRS Chief Counsel attorneys to work with authorized representatives on their tax court cases even though no formal entry of appearance has been made in a particular case. However, because of the limitations placed on such representation, an attorney should enter his or her appearance in order to advocate for taxpayers effectively. See Chief Counsel Notices CC-2014-003 and CC-2017-006.

A case in Tax Court begins with filing the petition. Once your client receives a statutory Notice of Deficiency, Notice of Determination, or Final Notice of Determination, you have 90 days from the date of the notice to respond by filing a tax court petition. The deadline to petition the court is 150 days if the notice is addressed to a person who is out-

side the country. A practice tip is that if you have to file a last-minute petition, you should make sure to hand-deliver it to the postal office and mail it with registered or certified mail with return receipt requested. Timely filing a petition is a jurisdiction requirement, which is set by statute and cannot be extended by the court. Presently, all petitions must be filed at the U.S. Post Office or other similar delivery service and cannot be electronically filed. Internal Revenue Code (IRC) § 7502(b), a section commonly referred to as the “mailbox rule,” provides that the date that an item—including a tax court petition—is postmarked and mailed is also the date the item is considered filed. There has been substantial tax court litigation on whether a petition was timely filed, and it is an issue you will want to avoid. *See Pearson v. Commissioner*, 149 T.C. No. 20 & *Tilden v. Commissioner*, No. 15-3838.

A petition must include: (1) A copy of any Notice of Deficiency, Notice of Determination, or Final Notice of Determination; (2) Statement of Taxpayer Identification Number; (3) The Request for Place of Trial; and (4) the \$60 filing fee. Since all documents, except the Statement of Taxpayer Identification Number, filed in Tax Court are public records pursuant to IRC § 7461, be sure to redact all identifying data (i.e., SSN and addresses) when submitting a copy of the IRS notice. If your client filed the petition and failed to redact their identifying data before retaining your representation,



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you should file a motion to seal with good cause. *See Tax Court Rule 103.*

A well-drafted petition provides you a great start toward winning your case. Your petition must comply with tax court’s Rule of Practice and Procedure. In the petition, you need to address each allegation of mistakes made by the IRS with concise responses. Any issue you choose not to raise is conceded and the deficiency related to that issue will be

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The IRS is required to file an answer within 60 days from the date of service or to make a motion with respect to the petition within 45 days from the date of service. Tax Court Rule 36. Pursuant to *Branerton Corp. v. Commissioner*, 61 T.C. 691 (1974), the tax court is insistent that the parties use informal efforts to obtain needed information for the preparation of the case for trial. The court expects the parties to discuss, deliberate, and exchange ideas, thoughts, and opinions on an informal basis before resorting to the formal discovery methods specified in the rules. Accordingly, after answers are filed, the majority of the cases will be referred to appeals for settlement consideration. The assigned appeals officer will contact attorneys by a letter or by phone to schedule a teleconference. However, if you believe a face-to-face conference is to your client's best interest, you could request the appeals officer to transfer the jurisdiction to the local field appeals office. IRM § 8.4.2.3.1

If you reach a last-minute settlement with the IRS counsel, and both parties have signed the proposed decision, you should still plan to appear at the calendar call.

A case is placed on the calendar for trial when the tax court grants a petitioner a hearing. Both petitioners and the Commissioner of Internal Revenue (respondent) will receive a Notice of Trial approximately five months before the initial trial session. Appeals officers will forward any unresolved case to the IRS counsel for trial preparation. During this period, you should continue to negotiate with the IRS counsel to reach a settlement.

A vast majority of the tax court cases typically settle before the trial session. On the morning of each trial session, the trial clerk calls through the docket list to schedule hearings and trials

for any unsettled cases and to provide final status update on last minute settled cases. If you reach a last-minute settlement with the IRS counsel, and both parties have signed the proposed decision, you should still plan to appear at the calendar call.

We hope this brief tax court summary highlights the unique opportunities tax court can provide to a licensed attorney. If you are interested in practicing before the U.S. Tax Court, we encourage you to join the local Low Income Taxpayer Clinics to participate in a calendar call program. **C**



Derek N. Hatch is a tax and estate planning attorney at Jeffrey Burr, Ltd. and represents clients before all federal and state tax agencies, including the IRS and Nevada Department of Taxation. Mr. Hatch received his law degree from Chapman University School of Law and also holds an LL.M. in taxation.

Szu-Ju Chang is a tax attorney at Nevada Legal Services' Low Income Taxpayer Clinic. She focuses her practice on resolving federal tax controversies and is licensed to practice in Washington, D.C., Illinois, and Nevada.



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