

Litigating in U.S. Tax Court

1. Jurisdiction

The Tax Court is a court of limited jurisdiction, possessing only those powers to adjudicate controversies which have been expressly, statutorily conferred on it by Congress.¹ The Tax Court is without authority to enlarge upon that statutory grant of jurisdiction.² The Tax Court nevertheless has jurisdiction to determine whether it has jurisdiction.³

If the Tax Court finds that it lacks jurisdiction to consider an issue, it cannot decide the issue, even if all of the parties wish it to do so.⁴ Conversely, once invoked by a taxpayer, jurisdiction lies with the Tax Court and generally remains unimpaired until the court has entered a decision.

Remember: In order to litigate in the Tax Court, a valid notice of deficiency and a timely filed petition to the Tax Court are needed.

A. Deficiency Jurisdiction

i. This jurisdiction depends upon: (1) the IRS issuing a notice of deficiency with respect to tax deficiencies determined under Subtitle A (income taxes), Subtitle B (estate and gift taxes), or Chapters 41, 42, 43, or 44 (certain excise taxes); and (2) the taxpayer filing a timely petition with regard to the tax deficiency.⁵

a. The income tax category includes accumulated earnings tax, the personal holding company tax, self-employment tax, and liability for withholding of tax on nonresident aliens and foreign corporations.

b. The excise tax category includes those taxes imposed on certain activities of public charities, private foundations and certain other tax-exempt organizations, REITs and regulated investment companies (RICs).

c. The Tax Court's deficiency jurisdiction extends to notices of deficiency based on transferee or fiduciary liability for income, estate, and gift taxes.

d. The Tax Court has jurisdiction to order refunds of amounts collected during the period the IRS is prohibited from collecting the deficiency through levy or court proceeding. In addition, the Tax Court may review administrative determinations necessary to determine the merits of the deficiency determinations for abuse of discretion.

e. Once the Tax Court acquires jurisdiction to redetermine a deficiency, it has authority to determine the amount of any overpayment of the same tax for the same

¹ § 7442; Continental Equities, Inc. v. Comm'r, 551 F.2d 74, 79 (5th Cir. 1977); Logan v. Comm'r, 86 TC 1222, 1226 (1986).

² See, Philips Petroleum Co. v. Comm'r, 92 TC 885, 888 (1989), and cases cited therein.

³ Hambrick v. Comm'r, 118 TC 348 (2002); Pyo v. Comm'r, 83 T.C. 626, 632 (1984).

⁴ Naftel v. Comm'r, 85 TC 527, 530 (1985); Wheeler's Peachtree Pharmacy, Inc. v. Comm'r, 35 TC 177, 179 (1960).

⁵ §§ 6212 and 6213.

taxable period, subject to certain limitations on the amount of any credit or refund.⁶ Moreover, if the IRS fails to refund an overpayment determined by the Tax Court within 120 days after a final decision, the Tax Court has jurisdiction to order the refund of the overpayment and interest thereon.⁷

Key Point: The Tax Court acquires exclusive jurisdiction over the specific tax and taxable years that are at issue. However, Section 6214 of the Internal Revenue Code allows the Tax Court to consider facts and circumstances with respect to other years, so long as this is necessary to determine the liability in the taxable years before the court.

B Petition, filing and representation

i. A petition for redetermination must be filed within 90 days (in certain cases, 150 days) of the date on which the notice of deficiency is sent. If the petition is not timely filed, the Tax Court will not have jurisdiction over the matter and the petition will be dismissed. Tax Court petitions are subject to the 'mail box rule' under Section 7502 of the Internal Revenue Code. Therefore, a timely mailed petition will be deemed timely filed.

ii. The following must be included with the petition sent to the Tax Court:

- One signed original petition and two conformed copies, with the notice of deficiency attached as an exhibit to each of the copies and the original;
- A signed statement of the taxpayer identification number (the taxpayer's social security number should not be included in the actual petition);
- A filing fee of \$60⁸ payable to "the Clerk, United States Tax Court"; and
- A signed original of the designation of place of trial and two conformed copies.
- The petition should be mailed to United States Tax Court – Clerk of the Tax Court, 400 Second Street NW, Washington DC 20217, United States.

iii. The IRS is represented by attorneys from the Office of Chief Counsel for the IRS (they will be located in Portland, Oregon). A taxpayer can either appear alone or be represented by a person admitted to practice before the Tax Court. Once a representative's appearance is entered, it cannot be withdrawn without approval of the court.

iv. Tax Court Rule 34 requires that the petition must be substantially in accordance with Tax Court Form 1 (located at <http://ustaxcourt.gov/>) and the rules regarding pleadings (Tax Court Rules 30-33). Specifically, Tax Court Rule 31 states that the purpose of pleadings is to give fair notice of the matters in controversy and the basis for each party's position. Moreover Tax Court Rule 31 provides that each statement must be simple, concise, and direct. Finally, be cognizant of the fact that, ordinarily, a separate

⁶ § 6512.

⁷ § 6512(b)(2).

⁸ Please note this fee can be waived if a taxpayer files an affidavit containing financial information which establishes an inability to pay the fee.

petition should be filed for each notice of deficiency, but a single petition can be filed with respect to multiple notices (multiple years, for example) issued to the same taxpayer.

v. All papers filed with the Tax Court must have a caption, be dated and be signed. In addition, each pleading must have a caption with the following:

- Name of the court (the U.S. Tax Court);
- Title of the case (*Joe Client, Petitioner v. Commissioner of the Internal Revenue Service*)
- Petitioner's name and State of legal residence (or principal place of business or principal office if the issue involves a corporation);⁹
- The date of the notice of deficiency or liability, and the IRS office that issued the notice;
- The amount of the deficiency or liability, the nature of the tax, the tax years, and the approximate amount of tax in controversy;
- Clear and concise assignment of each error alleged to have been committed by the IRS;
- Clear and concise lettered statements of the facts on which the taxpayer bases his assignments of error (except where the IRS has the burden of proof such as fraud);
- A prayer setting forth the relief sought (e.g., a finding that there is no deficiency or that the taxpayer is entitled to a refund of a specific amount);
- Signature, mailing address, and telephone number of the taxpayer or of his counsel, as well as counsel's Tax Court bar number. It is essential the petition be signed by each taxpayer or counsel (I have all of us sign out of best practices) as each signature certifies that the signer has read the petition and believes that it is well grounded in fact and is warranted by existing law or by a good-faith argument for extending, modifying or reversing existing law; and
- A copy of the notice of deficiency or liability.

Key Point: I always add one additional item to my Petition (see example) that the burden of proof rules in § 7491 were satisfied by the Petitioner during the audit and appeals proceeding so that the burden of proof has shifted to the IRS. This will eliminate any possible argument by the IRS that it was not timely notified that the petitioner intended to ask the court to shift the burden and might also help you in attempting a negotiated settlement prior to trial.

Key Point: E-filing is mandatory for most taxpayers represented by counsel in cases where the petition was filed on or after July 1 2010. **However, initial filings, such as the petition, may be filed in paper form only.**

Key Point: Counsel may enter appearance on a case either by signing the petition or by filing an entry of appearance.

Key Point: The U.S. Tax Court has a form on its website called: "Petition (Simplified Form)". It is strongly recommended you utilize this form to put together your Petition.

⁹ Please note that such information must be stated as of the date the petition is filed.

Key Point: If you are not yet admitted to the U.S. Tax Court, the U.S. Tax court has a form on its website called “Admissions Information for Nonattorneys”

Key Point: There is no need to serve the IRS with a Petition as the Clerk of the Tax Court makes a copy of the petition and serves it on the IRS for you. However, all other motions and other document subsequently filed with the Tax Court requires that you do serve a copy of the Chief Counsel lawyer representing the IRS and a certification to the court that such document was served.

Let’s review the sample Petition in your appendix.

vi. After the Clerk of the Tax Court serves the Petition on the IRS, the IRS has 45 days to file a motion or 60 days to file an Answer to the Petition.¹⁰ Tax Court rules permit the IRS to file a motion for a more definite statement if the IRS does not understand the contents of your Petition; a motion to strike if the IRS thinks a defense has no merit or is unrelated to the issue in controversy, or a motion to dismiss if the IRS perceives you have not raised a legitimate claim.

- a. The IRS’ Answer must contain a specific admission or denial or a statement of lack of knowledge; otherwise, a material allegation is deemed admitted, which means that any assertion made in your Petition, if not responded/challenged by the IRS is automatically in your favor when reviewed by the Tax Court.
- b. Additionally, if the IRS attempts to raise an affirmative defense like the Statute of Limitations, Tax Court Rule 39 requires that it be in the Answer.

vii. Where the IRS's Answer includes a defense or other matter as to which the IRS has the burden of proof, the taxpayer generally has 30 days from date of service to file a motion regarding the answer or 45 days from date of service to reply to the answer. Moreover, as to each material allegation in the IRS's answer on which the IRS has the burden of proof, the taxpayer must include in the reply a specific admission or denial or a statement of lack of knowledge. The taxpayer must also include any affirmative defense to the issues as to which the IRS has the burden of proof. If the taxpayer files a reply but expressly fails to admit or deny any affirmative allegation included in the answer, the allegation is deemed admitted.

The filing of the Answer by the IRS (and the Reply where one is required by the Taxpayer) closes the pleadings and makes the case at issue. (Tax Court Rule 38). At such time, the Tax Court schedules it for trial.

viii. The Calendaring Process – After the Petition, Answer, etc. is filed, the Clerk of the Tax Court will then place the case on a calendar for trial at the place petitioner designated at the time he filed the petition.¹¹

- a. The Clerk will send the petitioner or his counsel a notice of trial and a copy of the standing pretrial order.
- b. The Tax Court website states that a case may be scheduled for trial as soon as six months after the answer is filed, but typically the period is longer, depending in part on which city is designated and the activity in the case after all the pleadings are filed.

¹⁰ Tax Court Rules 36(a).

¹¹ Tax Court Rule 140 and Tax Court Form 5.

- ix. Pre-trial Order - All Judges Now Use the Same Standing Pretrial Order.
 - a. The Court attaches the Standing Pretrial Order to the Notice Setting Case for Trial.
 - b. The Notice Setting Case for Trial is usually received about six months before the first day of the calendar on which the case is scheduled for trial.
 - c. The Standing Pretrial Order establishes the basic framework for all tasks that should be completed before the case is called for trial, including: (i) Factual stipulations; (ii) documentary and written evidence, identification and stipulations; (iii) trial memorandum, preparation and exchange; (iv) fact witnesses, identification and summary of testimony; and (v) preparation and exchange of expert witness reports.

**** Let's look quickly at the Pre-Trial order in your appendix.

2. Discovery

i. Before proceeding with the formal discovery procedures, the parties are expected to pursue informal discovery. The Tax Court frowns on a party's immediate use of formal discovery. According to Tax Court Rule 70(a)(1), the court expects the parties to attempt to attain the objectives of discovery through informal consultation or communication before utilizing the discovery procedures provided in the Tax Court Rules.

- Informal discovery – Pursuing informal discovery before commencing formal discovery procedures is mandatory and failure to do so constitutes an abuse of the court's procedures.¹² Informal discovery is initiated by a "Branerton letter", which lists the factual and documentary information sought by the requesting party and proposes a date and location for an initial conference.

*** Let's look quickly at the sample Branerton letter in your appendix

- Formal discovery – the following discovery procedures are available to Tax Court litigants: interrogatories, requests for document production, deposition and requests for admission.

ii Discovery is available with respect to any matter relevant to the subject matter of the case and not privileged. **The information sought must appear to be reasonably calculated to lead to the discovery of admissible evidence.**

a. Under Tax Court Rule 70, the Tax Court may limit the use of discovery procedures if:

- The discovery is unreasonably cumulative or duplicative or is otherwise obtainable from another source that would be more convenient, less burdensome and less expensive;

¹² Branerton Corp v Commissioner, 61 TC 691 (1974).

- There already has been ample opportunity to obtain information through discovery in the proceeding; or
- It is unduly burdensome or expensive considering the needs of the case, the amount in controversy, the limitations on parties' resources, and the importance of the issues involved.

b. Matter produced in response to a discovery request is not evidence in the case. If a party wishes to make the matter evidence, the party must offer it as evidence at the trial or submit it to the court as part of a stipulation of facts entered into with the other party.¹³

c. Effective July 6, 2012, the Tax Court amended Rule 70 to add protections from discovery for certain documents.

- Rule 70(c)(4)(A) protects from discovery all drafts of expert witness reports, regardless of the form in which the draft reports are recorded.
- Rule 70(c)(4)(B) protects from discovery communications between a party's counsel and any expert witness except to the extent the communication relates to the compensation for the study or testimony, identifies facts or data provided by counsel and relied upon by the expert in forming the opinions expressed, or identifies assumptions provided by a party's counsel and relied on by the expert in forming the opinions expressed.
- However, Rule 70(c)(4)(B)(ii) and (iii) allows discovery of the facts and data and assumptions provided to the expert by an attorney and considered by the expert in forming an opinion and does not prohibit a party from questioning experts at trial on the same information and communications that are protected in discovery.
- Rule 70(c)(4)(C) protects from discovery all communications with an expert who is retained in anticipation for litigation or preparation for trial but is not expected to be called as a witness except on a showing of exceptional circumstances that the facts or opinions cannot be obtained through other means.

iii. Formal discovery must be commenced not earlier than 30 days after the last pleading is filed (petition, answer or reply depending on the case at hand), and must be completed no later than 45 days before the trial call date.¹⁴

iv. Interrogatories - The use of written interrogatories is permitted under Tax Court Rule 71. Without the leave of the court (i.e., requiring court to issue an order), parties are no longer permitted to serve more than **25** written interrogatories on other parties, except in specific circumstances. Answers to interrogatories are considered admissions of the answering party and may be used at trial.¹⁵ Interrogatories should be numbered sequentially.¹⁶

¹³ Tax Court Rule 70(d).

¹⁴ Tax Court Rule 70(a)(2).

¹⁵ Tax Court Rule 70(d).

¹⁶ Tax Court Rules 71(a) and (c).

a. In answering interrogatories, a party must respond completely and in good faith or set forth an objection to the particular interrogatory. The party must make reasonable inquiry and ascertain readily obtainable facts. Lack of information or knowledge cannot be given as an answer, unless the party states that reasonable inquiry has been made and that information known or readily obtainable is insufficient to enable the party to respond.¹⁷

b. Answers or objections to interrogatories must have the same numbering as the interrogatories. Answers are to be signed, under oath, by the person making them. Objections must be signed either by the party or the party's counsel. Neither the interrogatories nor the answers are filed with the court; if however, a party moves for sanctions under Tax Court Rule 104 for failure to respond, copies of the interrogatories and responses must be attached as exhibits.

c. A proper use of an interrogatory is to obtain the identity of the opposing party's intended expert witness, that witness's qualifications, and the subject matter and substance of the expert's testimony.¹⁸ A party often waits for some time before hiring an expert; therefore, an early interrogatory on this subject may elicit a response of lack of knowledge. In the case of such a response, a party must reasonably supplement its response when it learns the identity of its expert witness and the subject matter and substance of that expert's testimony.

v. Requests for Production – This is permitted under Tax Court Rule 72. A request for production of documents must set forth with reasonable particularity the items to be inspected. In essence, without involving the Tax Court, a party can serve on another party to the case a request to produce documents, electronically stored information, or any tangible thing for inspection, copying, testing, or sampling, provided that the items are in that party's possession, custody, or control. The request can also include electronically stored information (including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data compilations stored in any medium). In addition, the responding party can be required to convert data compilations into a reasonably usable form. A party can also request to enter real property that is in the possession or control of the other party for purposes of inspection, measuring, surveying, photographing, testing, or sampling the land or any designated object or operation concerning the property. The material sought must fall within the scope of discovery described in Rule 70(c)(1), not privileged and relevant to the subject matter of the pending case.

- A request must specify a reasonable time, place, and manner for making the inspection and performing related acts. The request may also specify the form or forms in which electronically stored information is to be produced. A written response must be served within 30 days, unless the court directs otherwise.
- A taxpayer may properly request that the IRS produce transcripts or notes of statements made by the taxpayer or third parties to the IRS's agents, as well as third-party records gathered by the IRS during an audit. Furthermore, the taxpayer may

¹⁷ Tax Court Rule 71(b).

¹⁸ Tax Court Rule 71(d)(1).

request the special agent's or revenue agent's report; however, the IRS is not required to produce those portions of the reports which reflect the agent's opinions or deliberative processes.

vi. Requests for admission - Governed by Tax Court Rule 90 and may relate to statements, opinions of fact, the genuineness of documents and the application of law to fact. An admission in response to the request for admission will be conclusively established for all purposes in the pending case. Tax Court Rule 90(a) specifically states

- The request must advise that each matter will be deemed admitted absent a timely written answer or objection.
- The Tax Court expects the parties to obtain the objectives of requests for admission through informal consultation or communication before resorting to formal requests.
- Each matter as to which an admission is requested must be set forth in a separately numbered paragraph. Copies of documents as to which an admission is requested must be served with the request, unless furnished previously or made available for inspection and copying. The original of the request is filed with the court, together with proof of service; the party making the request must serve the other party with a copy of the request.
- Remember that if a party fails to respond to the request, *it is equivalent to admitting such is true!!*
- The served party has 30 days following service of the request to file with the court a response to each item in the request. The response to each request must be either a denial, admission, qualified admission (stating the qualifications), detailed objection to the request, or statement setting forth in detail why the request cannot truthfully be admitted or denied. Lack of information is not an acceptable response, unless the party states that reasonable inquiry has been made and that information known or readily obtainable by him is insufficient to enable him to admit or deny. The response must be signed by the party or counsel.

vii. Depositions - Tax Court Rule 74 allows depositions for discovery purposes upon a motion by a party or at the discretion of the court. Depositions with the consent of the parties may be taken of a party, non-party or expert witness. A deposition without the consent of all parties is considered an extraordinary method of discovery and may be taken only when the testimony or other information sought cannot be practically obtained through informal consultation or by other discovery devices. Subject to the rules of evidence, elicited deposition testimony may be used at trial or any other proceeding in the pending case against any party that was present at the deposition, was represented at the deposition or had reasonable notice of the deposition.

- Depositions may be on written questions or oral questions. Depositions upon written questions are not favored and should not be taken in the absence of a special reason. They are required when the deposition is to be taken in a foreign country. Depositions

on oral questions are memorialized in a transcript. Tax Court Rule 81(j) sets forth the procedures to be used to video record on a tape or DVD a deposition to perpetuate testimony.

- Depositions (domestic and foreign) can be taken before: (1) an officer authorized to administer oaths by the laws of the United States or the place where the deposition is to occur; or (2) any person appointed by the Tax Court.¹⁹
- With the consent of the parties, depositions for purposes of discovery or to perpetuate testimony may be taken of any party or non-party including an expert, in the period beginning 31 days after conclusion of the pleadings, and ending 45 days prior to the date set for the call of the case from a trial calendar.²⁰
- A proposed deponent is given notice of the deposition and has 15 days to object to the deposition by serving the objections on the party seeking the deposition. A party receiving an objection from a proposed deponent must move for an Order from the Tax Court concerning the objection or the proposed deponent's failure to appear.²¹
- A discovery deposition under Tax Court Rule 74(c) is commenced by serving a notice on every party to the case and the proposed deponent. Objections to the deposition must be served on the party seeking the deposition by any party or by the proposed deponent within 15 days. The burden is on the party seeking the deposition to move for an order concerning the objection or any failure to appear.²²
- Tax Court litigants may raise defenses to discovery requests, such as relevancy, overbreadth, burdensomeness, attorney-client privilege and work product.

viii. Administrative Summons - Sections 7602 and 7609 authorize the IRS to issue summonses to examine the tax liability of any person. Summonses can be issued to the taxpayer or to third parties and may request testimony or documents. Often, the IRS issues summonses during a civil tax audit. In some cases, a notice of deficiency is issued after a summons but before there has been compliance with the summons. In other cases, the IRS issues summonses in audits of taxpayers who are related to a taxpayer with a pending Tax Court case or summonses to taxpayers with pending Tax Court cases in audits of such taxpayers' non-docketed tax years (years not at issue before the Tax Court). In these instances, the issuance of such summonses raises an apparent conflict with the Tax Court discovery rules in that, if enforced, they may allow the IRS to obtain documents, testimony, or information pertinent to a pending case which the IRS might not otherwise be able to obtain through Tax Court discovery.

¹⁹ Tax Court Rule 81(e).

²⁰ Tax Court Rules 70(a)(2), 74(a) and 81(d).

²¹ Tax Court Rules 74(a) and 81(d).

²² Tax Court Rule 74(c).

- The Tax Court will not interfere with the enforcement of summonses issued before a Tax Court petition is filed, and will not exclude from evidence in the Tax Court proceeding material gathered from such summonses.

3. **Pre-Trial Actions**

A. Two types:

1. Formal (with Court and Counsel).
2. Informal (with Appellate Conferee and Regional Counsel Trial Attorney).

B. **Formal Actions**

1. Court will undertake to confer with parties for purposes of Tax Court Rule 110(a), including:

- (a) Narrowing issues;
- (b) Assisting in obtaining stipulation of facts;
- (c) Simplifying presentation of evidence;
- (d) Resolving burden of proof issues;
- (e) Otherwise assisting in preparation for trial or possible disposition of case without trial; and
- (f) At the Court's discretion, issuing a pretrial order to facilitate and govern the trial's conduct and record the Court's pretrial rulings and parties' pretrial accords.

2. In a calendared case (this means you had a formal appeal and are filing suit), either party may request formal pretrial or it may be ordered by the Court on its own accord.²³

3. In an un-calendared case (you bypassed appeals and went directly to tax court), the Chief Judge, in his discretion, may schedule formal pretrial upon motion of either party or on the courts own accord.²⁴

4. Formal pretrial may be set:

a) In a calendared case, either: (i) during the trial session; or (ii) if there is sufficient reason, prior to calendar call, at such time and place as may be practicable and appropriate.²⁵

b) In an un-calendared case, either: (i) upon a calendar at the designated trial place; (ii) in Washington, D.C.; or (iii) any other convenient place.²⁶

c) The Court will attempt to schedule at practical and appropriate times and places.

²³ Tax Court Riles 110(b) and (c).

²⁴ Tax Court Rule 110(a).

²⁵ Tax Court Rule 110(b).

²⁶ Tax Court Rule 110(c).

d) The judge who conducts the formal pretrial conference need not be the judge who will try case.

5. A request for formal pretrial conference must state the reasons therefor, note other efforts to resolve matters informally, and state preferred times and places.²⁷

6. Parties are not permitted to utilize formal pretrial as substitute for preparing a proper stipulation but can request assistance where good faith efforts to obtain stipulation have been unsuccessful.

7. Not granted if frivolous or used as a delay tactic.

C. Informal Actions

1. Generally invited by Respondent's representatives to meet shortly after the Pleadings are completed.

2. Subject matter generally will involve: (a) discovery, admissions process; (b) evidentiary matters; (c) stipulation preparation timetables and allocation; and (d) settlement feasibility.

D. The use of telephonic pre-trial conferences has become more common in recent years. Pre-trial conference can be requested by motion by either party or may be ordered by the Tax Court. Pre-trial conference can be used for purposes of narrowing the issues, stipulating the facts, simplifying the presentation of evidence or otherwise preparing the case for trial.

E. Pre-trial memoranda must be exchanged by the parties at least 14 days before the first day of the trial.

4. **Final Status Reports** - Used by the parties to inform the court of last-minute settlements or changes in the parties' estimated time for the trial. The form must be received by the court by no later than 3:00 pm (Eastern Time) on the last business day before the first day of the trial session.

5. **Stipulation** - The trial stipulation process has been described as the "bedrock" of Tax Court practice. Tax Court Rule 91(a)(1) provides that the parties must stipulate "to the fullest extent to which complete or qualified agreement can or fairly should be reached" all matters that are not privileged but relevant to the pending case, regardless of whether such matters involve fact, opinion, or the application of law to fact. When the parties stipulate erroneous conclusions of law, however, the Tax Court is not bound by such stipulations.²⁸

- Trial stipulations must encompass all facts and documents which are not disputed. A party's belief that a fact or document is irrelevant is not a basis for failing to stipulate. Rather, the party must stipulate to the fact or document, while noting the relevancy objection in the stipulation. Matters obtained through discovery, if relevant, should be stipulated.

²⁷ Tax Court Rule 110(d).

²⁸ Redding v. Comm'r, 71 TC 597, 605 (1979).

- Trial stipulations must have separately numbered paragraphs and must describe any documents attached to the stipulation. The documents are considered part of the stipulation; thus, no foundation has to be laid concerning the introduction of these documents as evidence at trial.²⁹
- Stipulation must be signed by both parties. Parties' objections to any part of the stipulation are to be noted in the document and will be addressed at the beginning of a trial.
- Under Tax Court Rule 122, parties can submit a fully stipulated case for decision to the Tax Court without the necessity of a trial.

6. **Pre-trial motions include:**

- A motion to consolidate;³⁰
- A motion *in limine*,³¹ which is a pretrial motion requesting the court to prohibit a party from referring to or offering evidence at trial on matters irrelevant, inadmissible, and prejudicial to the moving party. In the Tax Court, it is increasingly common for parties to make motions *in limine* shortly before trial to bar the opposing side from introducing particular evidence or evidence on particular subjects. The purpose of these motions in the Tax Court is to allow the moving party an opportunity to know whether he has to attempt to uncover rebuttal evidence on the matters which are the subject of the motion. A favorable ruling on the motion usually shortens the trial and reduces the amount of necessary trial preparation. and
- A motion to seal the record.³²

7. **Settlement** - When a case is docketed in the Tax Court, ordinarily Chief Counsel has exclusive authority to settle the case. The IRS's procedure regarding docketed cases not involving disclosure or declaratory judgments is to refer the cases to the IRS Appeals office for settlement discussions if no Appeals conference has been previously held, unless Chief Counsel determines that there is little likelihood that a settlement of all or a part of the case can be achieved in a reasonable period of time.³³ Usually, Chief Counsel refers the case to Appeals immediately after an answer is filed, even if the taxpayer has not requested a referral to Appeals.

A. While Appeals has control of the case, it has exclusive jurisdiction to settle. In order for Chief Counsel to have adequate time to prepare the case for trial if settlement is not reached, Appeals ordinarily sends the case back to Chief Counsel after a notice of trial has been issued by the Tax Court; however, Chief Counsel and the Appeals office can agree to let Appeals keep exclusive jurisdiction of the

²⁹ Tax Court Rules 91(b) and (c).

³⁰ Tax Court Rule 141.

³¹ Fed. Rules Evid. 403.

³² Section 7461(b)(1).

³³ Rev. Proc. 87-24, 1987-1 CB 720, and Rev. Proc. 2012-18, 2012-10 IRB 455.

case for a longer period of time. If the case is returned to Chief Counsel, then Chief Counsel has exclusive settlement jurisdiction, although it may give Appeals settlement authority over some or all of the issues.

B. When standard settlement procedures, including references to Appeals, have failed, the parties may agree to use mediation to achieve a settlement. Chief Counsel has issued rules and procedures for mediation in pending Tax Court cases and suggests that guidance can also be found in the procedures for mediation in Appeals.³⁴ Chief Counsel is of the view that mediation is generally appropriate for Tax Court cases involving factual issues. Each party will normally pay one-half of the mediator's compensation and expenses. Chief Counsel prefers a mediator without connection to either party and believes that consideration should be given to requesting that a special Trial Judge serve as mediator. The Tax Court has made these judges available for this service.

C. Regular Cases - If the taxpayer and the IRS agree to the dollar figures of tax and applicable penalties to settle a regular deficiency or liability case, the IRS typically prepares a decision document to be used to conclude the case. The decision document sets forth the tax deficiency, or overpayment, and penalties. The decision includes a stipulation—below the space for the judge's signature—which states that the parties agree that the court may enter the decision. If the stipulation is the result of a negotiated settlement, it typically also contains a sentence that provides that upon entry of the decision, the taxpayer waives the restrictions under §6213(a) on assessment and collection of the agreed upon deficiencies and penalties.

After both parties sign the stipulated decision, it is submitted to the Tax Court. A judge then signs the decision; the Clerk's office enters the decision in its docket sheet; and the court mails a conformed copy of the final decision to all parties. If a case has been placed on a regular trial calendar and a stipulated decision is signed by the parties within a few days before the call of that calendar, typically the IRS's counsel hand delivers the stipulation to the trial clerk within the hour before the calendar call commences. Cases in which stipulated decisions have been submitted in advance are not called at the calendar call.

Let's look at a sample stipulated decision.

D. Basis of Settlement - Often the parties reach an agreement to settle the case too near to the call of the calendar to prepare and execute a decision document before the calendar call. The basis of the settlement may consist of agreements as to how to treat all disputed items of income, gift, value, or penalties, but the parties may not have time to calculate the tax deficiencies and penalties, if any, which follow from the agreements on these matters. When such a settlement is reached but a decision cannot be submitted at the calendar call, the Tax Court judge typically requires a description of the basis of the settlement to be recited for the record at the calendar call. Alternatively, the basis of settlement can be set forth in a writing or stipulation filed with the court either before or during the calendar call. Typically, at the calendar call, the court grants a continuance of the case for 60 days or more to afford the parties time to compute the deficiency and penalties and an opportunity to submit a stipulated decision. The judge granting the continuance ordinarily retains jurisdiction of the case, to ensure that the parties follow through with their settlement.

The Tax Court applies general principles of contract law in determining whether a settlement has been reached. Accordingly, there is a valid settlement agreement once there has been an offer and

³⁴ IRM 35.5.5.4 (12-14-10).

acceptance. Settlement agreements can be repudiated only if there is a showing of lack of formal consent, fraud, mistake, or some similar ground—i.e., the standards akin to vacating a judgment entered by consent. While a valid settlement (once reached) cannot be unilaterally repudiated by a party, the Tax Court may exercise its power to modify or set aside an agreement where the moving party shows that a failure to modify will be prejudicial, that there will be no substantial injury to the opposing party, and that the inconvenience to the court will be slight. More stringent standards are applied where a trial is canceled on the basis of a settlement agreement.

E. Settlement Formalities -

1. A settlement proposal need not be written.
2. The Appeals Division will make computations, but petitioner should review them for accuracy.
3. The Appeals Division will prepare decision documents in cases they settle. Appeals Division settlement review must have been completed before the decision documents can be signed. IRS counsel prepares decision documents in cases it settles and files all executed decision documents with the Court.
4. Closing agreements, etc., are essentially tripartite negotiated and reviewed.
5. Special procedures are available to settle cases on uncollectibility of deficiency in conjunction with the Collection Division.
6. The Tax Court may modify or set aside a settlement where the opposing party will sustain no substantial injury, refusal to allow modification might result in injustice to the moving party, and the inconvenience to the Court is slight.
7. A § 7121 closing agreement will not be set aside in the absence of fraud or misrepresentation. The fact that both parties have signed a written closing agreement which is complete as to all essential terms indicates that there has been a meeting of the minds.³⁵
8. Ordinary principles of contract law dictate interpretation of closing agreements. Generally, the Court looks "within the four corners of the agreement" unless there is an ambiguous term. Where the taxpayer and Commissioner intend a different meaning for an ambiguous closing agreement term and the taxpayer knows that the Commissioner's interpretation is based on information the taxpayer withheld, the Court will uphold the Commissioner's interpretation.³⁶
9. A settlement stipulation is, in essence, a binding contract.
10. A settlement under § 7121 may be set aside upon a showing of fraud or malfeasance, or misrepresentation of a material fact. To show fraud or misrepresentation, respondent must: (i) provide evidence of a false or incorrect statement; and (ii) prove that petitioner knew the statement was false or incorrect.

³⁵ Mitchell v. Comm'r, 65 TCM 2157 (1993).

³⁶ Rink v. Comm'r, 100 TC 319 (1993), *aff'd* 47 F.3d 168 (6th Cir. 1995).

8. **Binding Arbitration** - Under Tax Court Rule 124, the parties can jointly move the court to resolve any issue in the case through voluntary binding arbitration or mediation. The parties must attach to the motion a stipulation including a statement of the issues to be resolved by the arbitrator, an agreement to be bound by his findings, and an agreement as to the identity of the new arbitrator or the procedure to select him and his compensation. This can be done any time after the case is at issue and before trial. The motion is heard by a judge or Special Trial Judge assigned by the Chief Judge, and the designated judge supervises the arbitration. The designated judge cannot be the arbitrator. The arbitrator, selected by the parties or selected through procedure which the parties have agreed to use, is appointed by order of the designated judge.

9. **Trial Proceedings**

A. In Tax Court litigation, the burden of proof is generally on the taxpayer to establish each element of the case by a preponderance of the evidence.³⁷ However, the IRS has the burden of proof in specific circumstances, including any new matter asserted by the commissioner, an increase in deficiency or affirmative defenses asserted in the answer, and fraud with the intent to evade tax, for which the burden of proof must be carried by clear and convincing evidence.³⁸

B. Trials before the Tax Court are conducted in accordance with the Federal Rules of Evidence.³⁹ Generally, the evidence must be material and relevant.⁴⁰ Evidentiary privileges, such as attorney-client privilege or work product, apply in appropriate circumstances. A trial witness's testimony is limited to truthful recitation of the relevant facts as to which the witness has personal knowledge.⁴¹

C. Subpoenas may be issued to compel persons to attend and give testimony or produce documents or electronically stored information at a Tax Court trial.⁴² On request, a subpoena may be obtained from the Tax Court's Office of the Clerk.

D. Under the standing pretrial order, each party is required to submit a trial memorandum to the judge and to serve a copy on opposing counsel not less than 14 days before the first day of the trial session. In the memorandum, a party usually must list the witnesses he intends to call, provide brief summaries of their testimony, estimate the time required for trial, advise as to status of a stipulation of facts, summarize the facts, provide a brief synopsis of legal authorities, and explain any anticipated evidentiary problems. The standing pretrial order provides that witnesses not identified in the memorandum will not be permitted to testify at the trial without leave of the court upon sufficient showing of cause.

Key Point: The memorandum gives each party an opportunity to explain his case to the judge. Therefore, it should be a preview of the evidence that will be introduced at the trial and of the party's post-trial brief, setting forth his version of the facts and the essential elements of his legal position and supporting authorities. If a party overstates his case as to certain matters, the judge may well view the balance of his position with an additional measure of skepticism. Where a party is unsure as to whether he will call

³⁷ Tax Court Rule 142(a).

³⁸ Tax Court Rule 142(b) and Section 7454(a).

³⁹ See, Tax Court Rule 143(a).

⁴⁰ Fed R Evid 401-402.

⁴¹ Fed. R. Evid. 401-402, 602-603.

⁴² Tax Court Rule 147, IRC § 7156.

certain witnesses, he should list them in the memorandum, since witnesses may be dropped but not added. Since the memorandum must be served on opposing counsel, it may assist the other side in cross-examination and preparing his case. Accordingly, an overly detailed memorandum may be counterproductive. Where the petitioner seeks a shift of the burden of proof under §7491(a), he should explain his position in the memorandum.

E. Final Status Report - In the event of a settlement or a change in the estimate of the likelihood and/or length of a trial, a party should file a Final Status Report so that it will be received by the court no later than 3:00 p.m. EST on the last business day (usually Friday) before a trial sessions begins. To do this, a party can go to the Tax Court website, click on the “Final Status Report” tab, complete the form on line, and submit it to the court electronically. Alternatively, a party can submit the form to the court by mail or fax. A party must also submit a copy to the opposing party by mail, e-mail, or fax. In addition, a party must submit a copy to the opposing party at the calendar call if the opposing party is present.

F. Burden of Proof - With exceptions explained below, the burden of proof in a Tax Court case is on the taxpayer.⁴³ **In other words, the taxpayer must prove by a preponderance of the evidence that the IRS's determination, as set forth in the notice of deficiency, is erroneous.**

i. Where the taxpayer introduces credible evidence relevant to ascertaining the taxpayer's liability, the burden of proof in court proceedings shifts so that the IRS has the burden of proof with respect to factual issues related to income, estate, gift, and generation-skipping transfer taxes.⁴⁴ To be eligible, the taxpayer must prove that he has:

- Complied with present-law substantiation requirements, whether generally or specifically imposed;
- Complied with present-law recordkeeping requirements; and
- Cooperated with reasonable IRS requests for meetings, interviews, witnesses, documents, and information.

Key Point: Cooperation encompasses providing reasonable assistance to the IRS in accessing witnesses, information, and documents not within the taxpayer's control, including providing English translations for witnesses or documents from foreign countries; exhausting administrative remedies, including IRS appeal rights; and establishing the applicability of a privilege. Cooperation does not require that the taxpayer agree to an extension of the limitations period.

Key Point: Credible evidence is the quality of evidence which, after critical analysis, the court would find sufficient upon which to base a decision on the issue if no contrary evidence were submitted, without regard to the judicial presumption of IRS correctness. Implausible factual assertions, frivolous claims, or tax protester-type arguments are not credible evidence. The IRS has not met its burden if the court finds that the evidence is equally balanced.

Key Point: Penalties - The IRS has the burden of production, i.e., it must initially come forward with evidence that is appropriate to apply a particular penalty, before the court can impose the penalty. If the

⁴³ Tax Court Rule 142(a).

⁴⁴ §7491(a).

taxpayer believes the penalty is not appropriate due to reasonable cause, substantial authority, or a similar provision, the taxpayer must raise those issues and bears the burden of proof with respect to those issues.⁴⁵ If the taxpayer-petitioner decides to seek a shift in the burden of proof under §7491, it should file a pretrial motion seeking a shift or assert in its pretrial memorandum that the burden is on the IRS.

Key Point: The IRS has the burden of proof by clear and convincing evidence for the following issues:

- Whether the taxpayer is guilty of fraud with intent to evade tax.
- Whether a foundation manager has knowingly (1) participated in an act of self-dealing; (2) participated in an investment which jeopardizes the carrying out of exempt purposes, as prescribed in §4944; or (3) agreed to make a taxable expenditure, within the meaning of §4945.
- Whether a §4912(d)(2) organization manager has knowingly agreed to make a disqualifying lobbying expenditure, within the meaning of §4912.
- Whether a §4955(f)(2) organization manager has knowingly agreed to make a political expenditure, within the meaning of §4955(d).
- Whether a payment is nondeductible under §162(c)(1) or (2) as an illegal bribe or kickback or in violation of a federal or any generally enforced state law including whether the state law is generally enforced

G. The trial framework is as follows:

- Call of trial calendar – at the call of a trial calendar, the case will be called by the judge.⁴⁶ This usually occurs at 10AM on the Monday or Tuesday when Monday is a holiday. At that time, the parties should let the judge know whether the case is ready for trial and an anticipated trial time.⁴⁷ At the calendar call, the judge will announce the tentative order in which the cases will be heard for trial.
- Opening statements – opening statements are generally allowed, and the party that carries the burden of proof will typically be the first to present its opening statement.
- Offering documents into evidence – it is generally a good practice to offer formally into evidence documents (e.g., deposition transcripts and answers to interrogatories) at the commencement of the trial.
- The party with the burden of proof will generally be the first to present direct testimony – this is generally followed by opposing party's cross-examination. Thereafter, the witness may be subject to re-direct and re-cross examinations.
- The commissioner will then present its evidence. After the commissioner rests, the petitioner may present rebuttal testimony.

⁴⁵ §7491(c).

⁴⁶ Tax Court Rule 132.

⁴⁷ *Id.*

- Closing arguments – judges, at their discretion, may allow closing oral arguments.⁴⁸

10. Post-Trial Proceedings

A. Generally, post-trial opening briefs must be filed 75 days after the conclusion of the trial and the answering briefs must be filed 45 days thereafter.⁴⁹ Each brief must include a cover page, a table of contents and a table of authorities.⁵⁰ The brief should also include a summary statement of the nature of the case, which includes a description of the tax involved, the issues to be decided, the date and place of trial, the judge and the due date of the brief being filed.⁵¹ The opening brief must include proposed findings of fact in numbered paragraphs.⁵² In an answering or reply brief, the parties should include objections to the proposed findings of the opposing party.⁵³ The brief should contain a summary of the argument.⁵⁴ The brief must also include a persuasive argument which sets forth and discusses in detail the points of law involved and any disputed questions of fact.⁵⁵ The brief should also include a conclusion and be signed by either the party or its counsel.⁵⁶

B. The Tax Court issues several types of opinion:

- Division opinions – a division opinion is a regular opinion of a single judge. It is published in the official *Tax Court Reporter*. A division opinion or a regular opinion is usually issued in cases of first impression or in cases that are selected to serve as precedent.
- Reviewed opinions – a reviewed opinion is reviewed by the entire court sitting as a court conference. A reviewed opinion is generally issued in high-profile cases or cases with legal sensitivities, such where the Tax Court has been reversed on the issue by a court of appeals or where a decision would invalidate a regulation or overrule a prior opinion.
- Memorandum opinion – a memorandum opinion is not published in the official *Tax Court Reporter*. However, it is published unofficially by various tax services. It is generally issued in fact-intensive cases and is not considered a binding precedent by the Tax Court.
- Summary opinion – a summary opinion is an opinion in a case tried under the small case procedure. These opinions are generally not published and are not reviewable by any court of appeals.

C. A decision of the Tax Court in deficiency litigation must specify the dollar amount of deficiency, liability or overpayment redetermined by the Tax Court. In cases where several cases are

⁴⁸ Tax Court Rule 151(a).

⁴⁹ Tax Court Rule 151(b)(1).

⁵⁰ Tax Court Rule 151(e)(1).

⁵¹ Tax Court Rule 151(e)(2).

⁵² Tax Court Rule 151(e)(3).

⁵³ *Id.*

⁵⁴ Tax Court Rule 151(e)(4).

⁵⁵ Tax Court Rule 151(e)(5).

⁵⁶ Tax Court Rule 151(e)(6).

consolidated for the purposes of the trial, a separate decision is entered for each docket number.⁵⁷ Tax Court Rule 155 provides a procedure for a submission of computation of the liability in accordance with the findings of facts and conclusions of the Tax Court.

D. In certain circumstances, the parties may file a motion for reconsideration of opinion or findings of fact under Tax Court Rule 161. Such motion is generally appropriate in circumstances where there is discovery of evidence which was unavailable during trial, or where the court's decision conflicts with a recent decision of another court. The Tax Court will generally not grant such a motion without a showing of unusual circumstances, prejudice or substantial error.

E. Tax Court Rule 162 allows parties to motion the Tax Court to vacate or revise a decision either with or without a new or further trial. The Tax Court has discretion as to whether to grant or deny such motion. As a general rule, the finality of a decision is absolute. While the Tax Court has held that it has the authority to act on a motion to vacate a decision even after it has been affirmed, reversed, or modified by a Court of Appeals, its authority to vacate a final decision is limited to cases involving a fraud on the court, situations where the Court never acquired jurisdiction, clerical errors, and mutual mistakes.

F. A decision of the Tax Court becomes final 90 days after entry if a notice of appeal is not filed.⁵⁸

G. Recovery of Litigation Costs

- i. Taxpayers may be awarded reasonable litigation costs under § 7430 if they have: 1) substantially prevailed in the litigation; 2) established that the position of the United States in the civil proceeding was unreasonable; and 3) exhausted the available administrative remedies. Whether the government was unreasonable depends on all the facts and circumstances of the case as well as the legal precedents relating to the case.
- ii. The U.S.'s position is substantially justified if it is justified to a degree that could satisfy a reasonable person and has a reasonable basis in both law and fact. A position has a reasonable basis in fact if there is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.
- iii. The motion to recover costs must be made within thirty days of the decision's entry.

11. **Post-Trial Motions**

⁵⁷ Tax Court Rule 155.

⁵⁸ §§ 7481(a)(1) and 7483.

A. As a general rule, a second trial will not be granted to consider a new theory which could and should have been presented in the first trial. The Tax Court's policy is to try all issues raised in a case in one proceeding to avoid piecemeal and protracted litigation.⁵⁹

B. The Tax Court has jurisdiction to resolve disputes arising from the Commissioner's post-decision computation of interest.⁶⁰

C. The Tax Court has the power to correct a clerical error in its decision where no party was misled or detrimentally relied on the error.⁶¹

D. The Tax Court may reconsider recent opinions where the opinions apparently are superseded by contemporaneous statutory changes.⁶²

E. When the taxpayer alleged fraud by the Commissioner, but failed to file a motion to vacate within the 30 day period under Tax Ct. R. 162, the Tax Court's decision became final on the expiration of the 90 day period within which the taxpayer could file a notice of appeal, and the Court has no jurisdiction to reconsider the decision and the underlying merits.⁶³

F. Once a taxpayer has filed a motion to redetermine interest (§ 7481(c)), the taxpayer may not withdraw the motion, nor may the Tax Court refuse to exercise jurisdiction.⁶⁴

G. Motions to vacate will only be granted in cases where: (i) there was fraud upon the court; (ii) the decision is a legal nullity (i.e., where the court lacked jurisdiction); or (iii) in extraordinary circumstances, where there is a mutual mistake of fact.⁶⁵

12. **Appeals**

A. Review of a decision of the Tax Court is obtained by filing a notice of appeal with the clerk of the Tax Court within 90 days after the decision of the Tax Court is entered.⁶⁶

B. An assessment of a deficiency made before the 90-day period allowed for appealing a Tax Court decision is invalid and does not become valid at the expiration of this period.⁶⁷

⁵⁹ Morris v. Comm'r, 61 TCM (CCH) 2249 (1991) (denying taxpayer's motion for leave to amend and reopen the record to raise a new theory because potential benefit would have been de minimis had he prevailed).

⁶⁰ Stauffacher v. Commissioner, 97 T.C. 453 (1991).

⁶¹ Michaels v. Commissioner, 144 F.3d 495 (7th Cir. 1998).

⁶² Fort Howard Corp. v. Commissioner, 107 T.C. 187 (1996) (granting joint motion to reconsider prior opinion and issuing supplemental opinion in light of amendment of § 162(k) by Small Business Job Protection Act).

⁶³ Vanstone v. Commissioner, 166 F.3d 1202 (2d Cir. 1998) (unpublished).

⁶⁴ Hallmark Cards v. Commissioner, 111 T.C. 266 (1998) (disallowing withdrawal of petitioner's motion).

⁶⁵ Cutaia v. Commissioner, 74 T.C.M. (CCH) 1261 (1997) (denying motion to vacate where court discerned no fraud); *see also* Wilson v. Commissioner, 74 T.C.M. (CCH) 1208 (1997) (granting motion to vacate for lack of jurisdiction where IRS mailed deficiency notice to incorrect address).

⁶⁶ §7483.

⁶⁷ Johnson v. United States, 990 F.2d 41 (2d Cir. 1993) (holding invalid lien on taxpayer's property based on such invalid assessment).

C. Where a taxpayer is litigating regarding multiple years, appeals are only proper on matters where: (i) the Tax Court has disposed of all years in question; or (ii) the Tax court has certified the claim as appropriate for appeal.⁶⁸

D. Where the taxpayer decides to appeal a Tax Court decision determining a deficiency and wants to delay assessment and payment of the deficiency, the taxpayer must file with the Tax Court a bond before the taxpayer files the notice of appeal or the taxpayer must file a bond with the notice.⁶⁹ Appealing taxpayers rarely file a bond, since they will have to pay additional interest if there is an affirmance (which is not deductible for individuals) and they will have to pay a premium to the surety. If a taxpayer wants to file a bond, the taxpayer should obtain one from a surety approved by the Treasury Department for an amount equal to double the sum of the amount of the deficiency and any additions. If a taxpayer seeks to use a bond for some lesser amount or some other surety, the taxpayer will have to file with the Tax Court a motion for leave to file such a bond and have the court act on it before the last day for filing the notice of appeal. The Tax Court has jurisdiction to reduce the appeal bond after a final decision is issued.⁷⁰

E. Standard of Review – Section 7482(a)(1) requires a court of appeals to review a Tax Court decision “in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury.” This mandate has been read to mean that court of appeals reviews legal conclusions of the Tax Court *de novo* and its findings of fact for clear error.

⁶⁸ See Brookes v. Commissioner, 163 F.3d 1124 (9th Cir. 1998) (denying appeal after Tax Court had declined jurisdiction over part of litigation, but had not resolved remainder).

⁶⁹ §7485.

⁷⁰ Poinier v. Commissioner, 96 T.C. 1 (1991).