

MOST LITIGATED ISSUES: Introduction

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

TAS identified the Most Litigated Issues from June 1, 2017, through May 31, 2018, by using commercial legal research databases. For purposes of this section of the Annual Report, the term “litigated” means cases in which the court issued an opinion.² This year’s Most Litigated Issues are, in order from most to least cases:

- Accuracy-Related Penalty (IRC §§ 6662(b)(1) and (2));³
- Trade or Business Expenses (IRC § 162(a) and related Code sections);
- Summons Enforcement (IRC §§ 7602(a), 7604(a), and 7609(a));
- Gross Income (IRC § 61 and related Code sections);
- Collection Due Process (CDP) hearings (IRC §§ 6320 and 6330);
- Failure to File Penalty (IRC § 6651(a)(1)), Failure to Pay Penalty (IRC § 6651(a)(2)), and Failure to Pay Estimated Tax Penalty (IRC § 6654);
- Civil Actions to Enforce Federal Tax Liens or to Subject Property to Payment of Tax (IRC § 7403);
- Charitable Contribution Deductions (IRC § 170);
- Schedule A Deductions Under IRC §§ 211-224; and
- Frivolous issues penalty (IRC § 6673 and related appellate-level sanctions).

Two topics, Schedule A deductions and the frivolous issues penalty were not identified as Most Litigated Issues last year. These issues replaced the family status issues and relief from joint and several liability as Most Litigated Issues.⁴ Frivolous issues last appeared in the Most Litigated Issues section in 2016⁵ while itemized deductions reported on Schedule A of IRS Form 1040 did not appear in the National Taxpayer Advocate’s Annual Report to Congress since 2002.⁶ Accuracy-related penalties remained the top litigated issue this year, and we identified 120 cases, 18 less than the 138 cases we identified last year

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

2 Many cases are resolved before the court issues an opinion. Some taxpayers reach a settlement with the IRS before trial, while the courts dismiss other taxpayers’ cases for a variety of reasons, including lack of jurisdiction and lack of prosecution. Courts can issue less formal “bench opinions,” which are not published or precedential.

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

4 See National Taxpayer Advocate 2017 Annual Report to Congress 345.

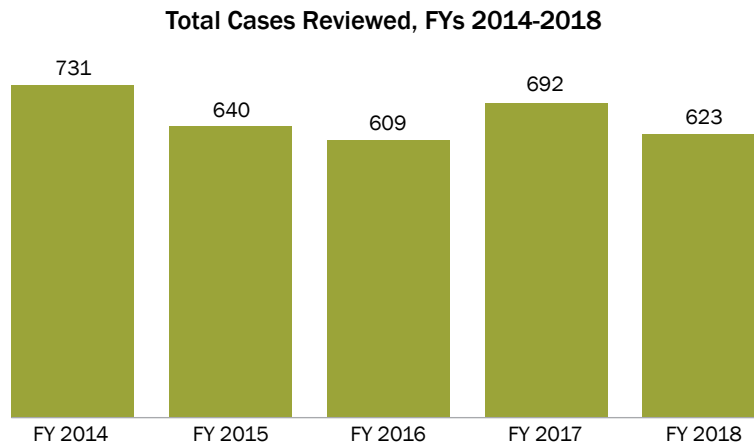
5 *Id.* at 410.

6 See National Taxpayer Advocate 2002 Annual Report to Congress 344-349. The Tax Cuts and Jobs Act (TCJA) suspended the overall limit on itemized deductions based on Adjusted Gross Income (AGI) for tax years 2018 through 2025. See Pub. L. No. 115-97, § 11046, 131 Stat. 2054, 2088 (2017). It remains to be seen how litigation in this area will change in the coming years due to the changes to itemized deductions under the TCJA.

(a 13 percent decrease).⁷ Most case categories decreased in number of cases litigated this year except for trade or business expenses, which experienced an increase of seven percent.⁸

Overall, the total number of cases identified in the Most Litigated Issues section decreased from 692 in 2017 to 623 this year, a 10 percent decrease from last year.⁹

FIGURE 3.0.1



We also noticed a slight dip from last year in the percentage of cases involving *pro se* taxpayers who prevailed, as 13 percent of *pro se* taxpayers prevailed as compared to 15 percent in 2017.¹⁰

⁷ See National Taxpayer Advocate 2017 Annual Report to Congress 348.

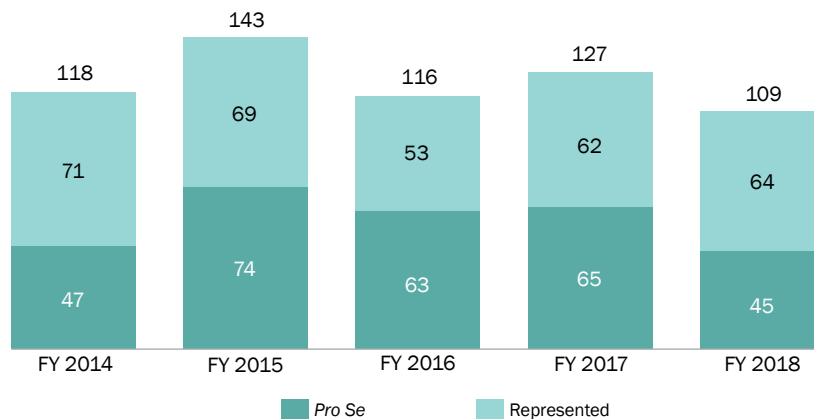
⁸ *Id.*

⁹ See National Taxpayer Advocate 2017 Annual Report to Congress 348. This decline may be attributed to the general decline in tax litigation in recent years. See, e.g., David McAfee, Tax Court: *Tax Court Caseload Drops as Enforcement Lags: Former Chief Judge 142 DTR 8* (Jul. 24, 2018) (former Chief Judge L. Paige Marvel noted that the Tax Court's inventory is dropping, due in part to lax enforcement).

¹⁰ See National Taxpayer Advocate 2017 Annual Report to Congress 349.

FIGURE 3.0.2

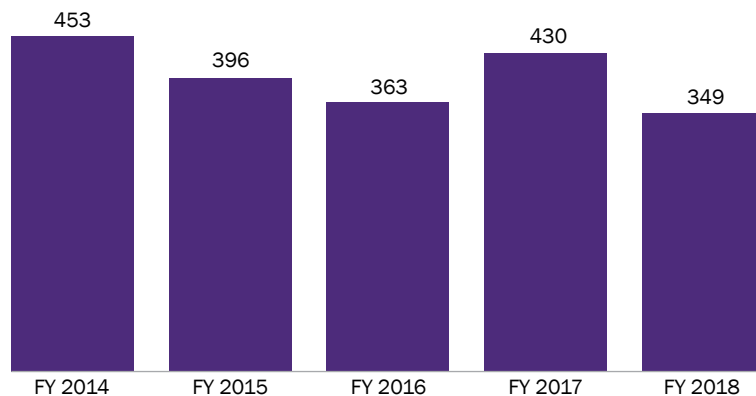
Taxpayers Prevailing in Full or Part, FYs 2014-2018



Overall, the percentage of *pro se* litigation decreased from 62 percent of cases to 56 percent.

FIGURE 3.0.3

Pro Se Litigants, FYs 2014-2018



Once TAS identified the Most Litigated Issues, we analyzed each one in five sections: summary of findings, taxpayer rights impacted, description of present law, analysis of the litigated cases, and conclusion.¹¹ Each case is listed in Appendix 3, which categorizes the cases by type of taxpayer (*i.e.*, individual or business).¹² Appendix 3 also provides the citation for each case, indicates whether the

11 See Taxpayer Bill of Rights (TBOR), www.TaxpayerAdvocate.irs.gov/taxpayer-rights. The rights contained in the TBOR are also codified in the Internal Revenue Code (IRC). See IRC § 7803(a)(3).

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

taxpayer was represented at trial or argued the case *pro se* (*i.e.*, without representation), and lists the court's decision.¹³

We have also included a “Significant Cases” section summarizing decisions that are not among the top ten issues but are relevant to tax administration. In this section, we used the same reporting period, beginning on June 1, 2017, and ending on May 31, 2018, that we used for the ten Most Litigated Issues.

For the second year, we reviewed Tax Court summary judgments and bench orders, which are unpublished, which we discuss separately below, but did not include in the final counts for the Most Litigated Issues.¹⁴ Unpublished litigation from the Tax Court has become available to the public in recent years through the court's website, but remains unavailable through electronic legal commercial databases.

AN OVERVIEW OF HOW TAX ISSUES ARE LITIGATED

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

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

With limited exceptions, taxpayers have an automatic right of appeal from the decisions of any of these courts.¹⁵

The Tax Court is a “prepayment” forum. In other words, taxpayers can access the Tax Court without having to pay the disputed tax in advance. The Tax Court has jurisdiction over a variety of issues, including deficiencies, certain declaratory judgment actions, appeals from CDP hearings, relief from joint and several liability, and determination of employment status.¹⁶

13 “*Pro se*” means “for oneself; on one’s own behalf; without a lawyer.” BLACK’S LAW DICTIONARY (10th ed. 2014). For purposes of this analysis, we considered the court’s decision with respect to the issue analyzed only. A “split” decision is defined as a partial allowance on the specific issue analyzed. The citations also indicate whether decisions were on appeal at the time this report went to print.

14 In prior years our review of litigation in federal courts was generally limited to discussing Tax Court opinions published in commercial databases. Each division or memorandum opinion goes through a legislatively mandated pre-issuance review by the Chief Judge. IRC §§ 7459(b); 7460(a). While division opinions are precedential, orders are not, being issued “in the exercise of discretion” by a single judge. See § 7463(b); Rule 50(f), Tax Court Rules of Practice and Procedure (denying precedential status to orders) and § 152(c) (denying precedential status to bench opinions).

15 See IRC § 7482, which provides that the United States Courts of Appeals (other than the United States Court of Appeals for the Federal Circuit) have jurisdiction to review the decisions of the Tax Court. There are exceptions to this general rule. For example, IRC § 7463 provides special procedures for small Tax Court cases (where the amount of deficiency or claimed overpayment totals \$50,000 or less) for which appellate review is not available. See also 28 U.S.C. § 1294 (appeals from a United States District Court are to the appropriate United States Court of Appeals); 28 U.S.C. § 1295 (appeals from the United States Court of Federal Claims are heard in the United States Court of Appeals for the Federal Circuit); 28 U.S.C. § 1254 (appeals from the United States Courts of Appeals may be reviewed by the United States Supreme Court).

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

The United States District Courts and the United States Court of Federal Claims have concurrent jurisdiction over tax matters in which (1) the tax has been assessed and paid in full¹⁷ and (2) the taxpayer has filed an administrative claim for refund.¹⁸ The United States District Courts, along with the bankruptcy courts in very limited circumstances, provide the only fora in which a taxpayer can receive a jury trial.¹⁹ Bankruptcy courts can adjudicate tax matters that were not adjudicated prior to the initiation of a bankruptcy case.²⁰

ANALYSIS OF PRO SE LITIGATION

As in previous years, many taxpayers appeared before the courts *pro se*. Figure 3.0.4 lists the Most Litigated Issues for the review period June 1, 2017, through May 31, 2018, and identifies the number of cases, categorized by issue, in which taxpayers appeared without representation. As the figure illustrates, the issues with the highest rates of *pro se* appearance are frivolous issues and civil actions to enforce tax liens or subject property to tax.

FIGURE 3.0.4, Pro Se Cases by Issue

Most Litigated Issue	Litigated Cases Reviewed	Pro Se Litigation	Percentage of Pro Se Cases
Accuracy-Related Penalty	120	60	50%
Trade or Business Expenses	106	60	57%
Summons Enforcement	85	51	60%
Gross Income	79	42	53%
Collection Due Process	74	46	62%
Failure to File, Failure to Pay, and Estimated Tax Penalties	47	19	40%
Civil Actions to Enforce Federal Tax Liens or to Subject Property to Payment of Tax	39	26	67%
Charitable Deductions	29	10	34%
Schedule A Deductions	23	15	65%
Frivolous Issues	21	20	95%
Total	623	349	56%

Figure 3.0.5 affirms our contention that taxpayers are more likely to prevail if they are represented. *Pro se* taxpayers prevailed in 13 percent of cases this year as compared to 15 percent last year. Thus, for this year, the success rate for represented taxpayers was ten percentage points greater than that of *pro se* taxpayers.

17 28 U.S.C. § 1346(a)(1). See *Flora v. United States*, 362 U.S. 145 (1960), *reh'g denied*, 362 U.S. 972 (1960). For the National Taxpayer Advocate's Legislative Recommendation regarding the *Flora* rule, see Legislative Recommendation: *Fix the Flora Rule: Give Taxpayers Who Cannot Pay the Same Access to Judicial Review as Those Who Can*, *supra*.

18 IRC § 7422(a).

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

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

FIGURE 3.0.5, Outcomes for Pro Se and Represented Taxpayers

Most Litigated Issue	Pro Se Taxpayers			Represented Taxpayers		
	Total Cases	Taxpayer Prevailed In Whole or In Part	Percent	Total Cases	Taxpayer Prevailed In Whole or In Part	Percent
Accuracy-Related Penalty	60	13	22%	60	21	35%
Trade or Business Expenses	60	10	17%	46	15	33%
Summons Enforcement	51	0	0%	34	7	21%
Gross Income	42	7	17%	37	9	24%
Collection Due Process	46	4	9%	28	5	18%
Failure to File, Failure to Pay, and Estimated Tax Penalties	19	2	11%	28	4	14%
Civil Actions to Enforce Federal Tax Liens or to Subject Property to Payment of Tax	26	0	0%	13	2	15%
Charitable Deductions	10	0	0%	19	5	26%
Schedule A Deductions	15	6	40%	8	1	13%
Frivolous Issues	20	3	15%	1	0	0%
Total	349	45	13%	274	69	25%

ANALYSIS OF UNPUBLISHED OPINIONS

We identified 107 bench orders and 203 summary judgments²¹ by searching the Tax Court orders on its website.²² We listed the selected cases in Appendix 3. We selected cases in which either a decision was entered on the merits of a substantive issue, or there was a substantive discussion of a distinct tax law matter.²³ The most prevalent issues discussed in the bench opinions reviewed (which also appear in this year's Most Litigated Issues) were accuracy-related penalty (43 cases or about 40 percent), trade or business expenses (39 cases or about 36 percent), and gross income (22 cases or 21 percent).²⁴

Eighty-two percent of the 1,120 summary judgment orders we reviewed were procedural and did not discuss a substantive tax law issue, leaving 203 substantive decisions. In contrast to bench opinions, CDP matters dominated this category of unpublished litigation, with 81 percent (165 cases) of the

21 Unlike bench orders, summary judgments are decisions without trial. U.S. Tax Court Rules of Practice and Procedure, Title XII. Denying summary judgment in full or in part leaves issues in play for litigation and is not a final disposition on the merits of the litigated issue, which is a prerequisite for including a case in the counts for the Most Litigated Issues.

22 We utilized the orders search tab applying the reporting period date restriction and key search phrases: "summary judgment" and "7459(b)." We did not analyze summary judgments and bench orders in other federal courts. See Public Access to Court Electronic Records (PACER) User Manual for ECF Courts, Sept. 2014, <https://www.pacer.gov/documents/pacermanual.pdf> (explaining PACER search functions). We limited our search to the Tax Court as most tax litigation occurs in Tax Court.

23 Under Rule 121(d), if the adverse party does not respond to the motion for summary judgment, then the Tax Court may enter a decision against that party, when appropriate, and in light of the evidence contained within the administrative record. See Rule 121(d), Tax Court Rules of Practice and Procedure. We included summary judgments entered upon default in situations where the order discussed the merits.

24 Cases often discuss more than one substantive issue and as a result these reported percentages do not total 100. In 2017, the same issues were in the top three, with different frequency. Gross income was the most frequent, followed by trade and business expenses, then the accuracy related penalty. National Taxpayer Advocate 2017 Annual Report to Congress 349.

substantive, non-procedural summary judgments. The next largest category consisted of gross income issues which made up about six percent (13 cases).

Overall the IRS prevailed in 91 percent of motions for summary judgment in the substantive, non-procedural cases (184 cases) and in about 68 percent of bench opinions (73 cases). Split decisions resulted in four percent (nine of 203) of summary judgment orders and in 21 percent (22 of 107) of bench opinions. Overall, 85 percent (262 cases) of taxpayers appeared pro se in the unpublished opinions reviewed.²⁵

²⁵ See Appendix 3, *infra*.