

## MOST LITIGATED ISSUES: Introduction

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Internal Revenue Code (IRC) § 7803(c)(2)(B)(ii)(XI) 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).<sup>1</sup> 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, 2018, through May 31, 2019, 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.<sup>2</sup> This year’s Most Litigated Issues are, in order from most to least cases:

1. Trade or Business Expenses (IRC § 162(a) and related Code sections);
2. Collection Due Process (CDP) hearings (IRC §§ 6320 and 6330);
3. Accuracy-Related Penalty (IRC § 6662(b)(1) and (2));<sup>3</sup>
4. Gross Income (IRC § 61 and related Code sections);
5. Summons Enforcement (IRC §§ 7602(a), 7604(a), and 7609(a));
6. Civil Actions to Enforce Federal Tax Liens or to Subject Property to Payment of Tax (IRC § 7403);
7. 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);
8. Schedule A Deductions (IRC §§ 211-224);
9. Charitable Contribution Deductions (IRC § 170); and
10. Frivolous Issues Penalty (IRC § 6673 and related appellate-level sanctions).

Overall, the total number of cases identified in the Most Litigated Issues section decreased again this year, from 623 in 2018 to 524 this year, a 16 percent decrease from last year.<sup>4</sup> Seven of the ten categories decreased in number of cases litigated this year. Accuracy-related penalties saw the greatest decrease since last year, dropping from 120 cases to 79 cases we identified this year (a 34 percent decrease). CDP, Liens, and Schedule A cases saw increases, with Schedule A seeing the biggest proportional increase from 23 to 32 cases (39 percent), and the Liens category seeing the biggest increase in cases, from 39 cases in 2018 to 52 cases this year (33 percent increase). Overall, taxpayers prevailed in full or in part in 86 cases (about 16 percent), a slight decrease from last year.

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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 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 2018 Annual Report to Congress 426. 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* (July 24, 2018) (former Chief Judge L. Paige Marvel noted that the Tax Court’s inventory is dropping, due in part to lax enforcement).

TAS analyzed each of the Most Litigated Issues, specifically a summary of findings, taxpayer rights impacted, description of present law, analysis of the litigated cases, and conclusion.<sup>5</sup> Each case is listed in Appendix 5, which categorizes the cases by type of taxpayer (*e.g.*, individual or business).<sup>6</sup> Appendix 5 also provides the citation for each case, indicates whether the taxpayer was represented at trial or argued the case *pro se*, and lists the court's decision.<sup>7</sup>

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 generally used the same reporting period, beginning on June 1, 2018, and ending on May 31, 2019, that we used for the ten Most Litigated Issues; however, we also included one significant case decided outside of the reporting period.

## AN OVERVIEW OF HOW TAX ISSUES ARE LITIGATED

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

- U.S. Tax Court;
- U.S. District Courts;
- U.S. Court of Federal Claims; and
- U.S. Bankruptcy Courts.

With limited exceptions, taxpayers have an automatic right of appeal from the decisions of any of these courts.<sup>8</sup>

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.<sup>9</sup>

The U.S. District Courts and the U.S. Court of Federal Claims have concurrent jurisdiction over tax matters in which (1) the tax has been assessed and paid in full<sup>10</sup> and (2) the taxpayer has filed an

5 See Taxpayer Bill of Rights (TBOR), [www.TaxpayerAdvocate.irs.gov/taxpayer-rights](http://www.TaxpayerAdvocate.irs.gov/taxpayer-rights). The rights contained in the TBOR that was proposed by the National Taxpayer Advocate and adopted by the IRS are now codified in the IRC. See IRC § 7803(a)(3).

6 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.

7 “*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.

8 See IRC § 7482, which provides that the U.S. Courts of Appeals (other than the U.S. Court of Appeals for the Federal Circuit) have jurisdiction to review the decisions of the U.S. 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 U.S. District Court are sent to the appropriate U.S. Court of Appeals); 28 U.S.C. § 1295 (appeals from the U.S. Court of Federal Claims are heard in the U.S. Court of Appeals for the Federal Circuit); 28 U.S.C. § 1254 (appeals from the U.S. Courts of Appeals may be reviewed by the U.S. Supreme Court).

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

10 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). See National Taxpayer Advocate 2020 Purple Book, *Compilation of Legislative Recommendations to Strengthen Taxpayer Rights and Improve Tax Administration 82-84 (Repeal Flora: Give Taxpayers Who Cannot Pay the Same Access to Judicial Review as Those Who Can)*.

administrative claim for refund.<sup>11</sup> The U.S. District Courts, along with the bankruptcy courts in very limited circumstances, provide the only fora in which a taxpayer can receive a jury trial.<sup>12</sup> Bankruptcy courts can adjudicate tax matters that were not adjudicated prior to the initiation of a bankruptcy case.<sup>13</sup>

## ANALYSIS OF PRO SE LITIGATION

As in previous years, many taxpayers appeared before the courts *pro se*. Figure 2.0.1 shows that taxpayers assisted by a representative achieved better outcomes than *pro se* taxpayers who represented themselves. *Pro se* taxpayers prevailed in full or in part in only 26 cases (five percent), and in five of the ten categories, the only taxpayers that achieved a favorable outcome were represented.

**FIGURE 2.0.1, Outcomes for Pro Se and Represented Taxpayers**

Most Litigated Issue	Pro Se Taxpayers			Represented Taxpayers		
	Total Cases	Taxpayer Prevailed in Full or in Part	Percent	Total Cases	Taxpayer Prevailed in Full or in Part	Percent
Trade or Business Expenses	35	6	17%	47	15	32%
Collection Due Process	25	4	16%	55	2	4%
Accuracy-Related Penalty	37	12	32%	42	15	36%
Gross Income	35	0	0%	37	12	32%
Summons Enforcement	37	0	0%	22	4	18%
Civil Actions to Enforce Federal Tax Liens or to Subject Property to Payment of Tax	23	0	0%	29	4	14%
Failure to File, Failure to Pay, and Estimated Tax Penalties	19	0	0%	15	2	13%
Schedule A Deductions	16	1	6%	16	2	13%
Charitable Deductions	7	0	0%	10	4	40%
Frivolous Issues	13	3	23%	3	0	0%
<b>Total</b>	<b>247</b>	<b>26</b>	<b>11%</b>	<b>276</b>	<b>60</b>	<b>22%</b>

11 IRC § 7422(a).

12 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).

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

## ANALYSIS OF UNPUBLISHED OPINIONS

For the third year, we reviewed Tax Court summary judgments and bench orders, both of which are unpublished.<sup>14</sup> 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.

We identified 63 bench orders and 181 summary judgments<sup>15</sup> by searching the Tax Court orders on its web site.<sup>16</sup> We listed the bench orders and summary judgments in tables, Appendix 5, Tables 11 and 12. 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.<sup>17</sup> The most prevalent issues discussed in the bench orders reviewed were trade or business expense deductions (17 of 63 or about 27 percent), CDP (13 of 63 or about 21 percent), and gross income (11 of 63 or about 17 percent).<sup>18</sup>

Eighty-five percent (991 of 1,172) of summary judgments we reviewed were procedural and did not discuss a substantive tax law issue, leaving 181 substantive decisions. CDP matters dominated this category of unpublished tax court litigation by far, comprising about 70 percent (127 of 181) of the remaining substantial, non-procedural summary judgments. The second largest category was gross income issues which made up about eight percent (15 of 181) of summary judgments.

Overall, the IRS prevailed in about 90 percent of motions for summary judgment (162 of 181) and in about 68 percent of bench orders (43 of 63). About two percent (three of 181) of summary judgment orders and about 25 percent (16 of 63) of bench orders resulted in split decisions. Taxpayers were least successful in bench order outcomes, with about six percent (four of 63) of taxpayers prevailing; whereas 16 of 181 taxpayers prevailed in summary judgments (about nine percent). Taxpayers appeared *pro se* in 46 of the 63 bench orders (73 percent) and were represented by counsel in only 17 of the 63 (about 27 percent). Of the total of 181 summary judgment orders, 126 (70 percent) taxpayers appeared *pro se*.<sup>19</sup>

14 In prior years our review of litigation in federal courts was generally limited to discussing U.S. 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 IRC § 7463(b); Unites States Tax Court Rules of Practice and Procedure, Rule 50(f), (denying precedential status to orders) and Rule 152(c) (denying precedential status to bench opinions).

15 Unlike bench orders, summary judgments are decisions without trial. United States 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 as a Most Litigated Issue.

16 We utilized the orders search tab on the U.S. Tax Court website, applying the reporting period date restriction and key search phrases: "summary judgment" and "7459(b)" and "152(b)." We did not analyze summary judgments and bench orders in other federal courts. There are thousands of documents to be reviewed in other federal courts to determine whether the cases were decided on the merits of a particular litigated issue. 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).

17 Under Tax Court 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 United States Tax Court Rules of Practice and Procedure, Rule 121(d). We included summary judgments entered upon default in situations where the order discussed the merits.

18 Since many of the bench orders involve multiple issues, the percentages do not add up to 100 percent.

19 See Appendix 5, Most Litigated Issues Case Tables 11 and 12, *infra*.