

## INTRODUCTION: Most Litigated Issues

Internal Revenue Code (IRC) § 7803(c)(2)(B)(ii)(X) requires the National Taxpayer Advocate to identify in her Annual Report to Congress (ARC) 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 recommendations to mitigate the disputes resulting in litigation.

TAS identified the Most Litigated Issues from June 1, 2016 through May 31, 2017, 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:

- Accuracy-Related Penalty (IRC §§ 6662(b)(1) (2));<sup>3</sup>
- Trade or Business Expenses (IRC § 162(a) and related Code sections);
- Summons Enforcement (IRC §§ 7602(a), 7604(a), and 7609(a));
- Collection Due Process (CDP) hearings (IRC §§ 6320 and 6330);
- Gross Income (IRC § 61 and related Code sections);
- 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 Deductions (IRC § 170);
- Family Status Issues Under IRC §§ 2, 24, 32, and 151; and
- Relief from Joint and Several Liability Under IRC § 6015.

Two topics, family status issues and relief from joint and several liability, were not identified as Most Litigated Issues last year.<sup>4</sup> These issues replaced the trust fund recovery penalty and the frivolous issues penalty as Most Litigated Issues.<sup>5</sup> Relief from joint and several liability last appeared in the Most Litigated Issues section in 2015<sup>6</sup> while family status issues was last identified as a Most Litigated Issue in 2010.<sup>7</sup> Accuracy-related penalties remained the top litigated issue this year, and we identified 138 cases, an increase of 16 cases (or 13 percent) compared to the last year.<sup>8</sup> Civil actions to enforce liens experienced the largest percentage increase, as we identified 60 cases this year compared with 32 cases last year, an 88 percent increase; however, this increase generally resulted from a change to our search

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 orders,” 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 For a discussion of the National Taxpayer Advocate’s concerns about family status issues and the complexity of claiming the various family-related credits, see 2016 National Taxpayer Advocate Annual Report to Congress 325-57.

5 National Taxpayer Advocate 2016 Annual Report to Congress 410.

6 National Taxpayer Advocate 2015 Annual Report to Congress 527.

7 National Taxpayer Advocate 2010 Annual Report to Congress 487.

8 National Taxpayer Advocate 2016 Annual Report to Congress 413.

methodology.<sup>9</sup> Most case categories showed increases in terms of number of litigated cases this year except for CDP, which experienced a decline of about 14 percent.<sup>10</sup>

Overall, the total number of cases identified in the Most Litigated Issues section increased from 609 in 2016 to 692 this year, an almost 14 percent increase from last year,<sup>11</sup> reversing the trend of declining litigation identified over the last few years.<sup>12</sup> We also noticed a slight dip from last year in the percentage of cases involving *pro se* taxpayers who prevailed, as 15 percent of *pro se* taxpayers prevailed during this reporting period as compared to 17 percent in 2016.<sup>13</sup>

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.<sup>14</sup> Each case is listed in Appendix 3, which categorizes the cases by type of taxpayer (*i.e.*, individual or business).<sup>15</sup> Appendix 3 also provides the citation for each case, indicates whether the taxpayer was represented at trial or argued the case *pro se* (*i.e.*, without representation), and lists the court's decision.<sup>16</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 used the same reporting period, beginning on June 1, 2016 and ending on May 31, 2017, that we used for the ten Most Litigated Issues.

Further, for this reporting cycle we expanded our review to include Tax Court summary judgments and bench orders, which are unpublished.<sup>17</sup> Unpublished litigation from the Tax Court has become available

9 National Taxpayer Advocate 2016 Annual Report to Congress 491. In our 2016 Annual Report to Congress, we identified 32 cases involving civil actions to enforce tax liens under IRC § 7403. See National Taxpayer Advocate 2016 Annual Report to Congress 491. As we identified more lien enforcement cases this year than in the 2016 Annual Report, we revisited our case search criteria used to identify cases for this Most Litigated Issue and employed a more expansive search methodology using broader search terms to account for the fact that United States District Courts, which under IRC § 7403(a) have exclusive jurisdiction over lien enforcement actions, often do not cite to IRC § 7403 in case opinions. As a result, we identified a total of 50 lien enforcement cases for the 2016 reporting period. However, this increase in cases would not have materially changed the ranking of that Most Litigated Issue in the 2016 Annual Report to Congress.

10 National Taxpayer Advocate 2016 Annual Report to Congress 413.

11 *Id.*

12 As previously noted, we adjusted our methodology for identifying liens enforcement cases in this reporting cycle. However, applying the new methodology to the 2016 Most Litigated Issues resulted in the identification of additional cases for the topic of liens enforcement, which still results in an increase of 65 total cases between the 2016 and 2017 cycles or ten percent. We identified 640 cases in 2015, 731 cases in 2014, and 877 cases in 2013. See National Taxpayer Advocate 2015 Annual Report to Congress 429; National Taxpayer Advocate 2014 Annual Report to Congress 425; National Taxpayer Advocate 2013 Annual Report to Congress 324.

13 See National Taxpayer Advocate 2016 Annual Report to Congress 414.

14 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 adopted by the IRS are now listed in the IRC. See Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Division Q, Title IV, § 401(a) (2015) (codified at IRC § 7803(a)(3)).

15 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.

16 “*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.

17 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).

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.<sup>18</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>19</sup>

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 full,<sup>20</sup> and (2) the taxpayer has filed an administrative claim for refund.<sup>21</sup> 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.<sup>22</sup> Bankruptcy courts can adjudicate tax matters that were not adjudicated prior to the initiation of a bankruptcy case.<sup>23</sup>

18 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).

19 See, e.g., IRC §§ 6214; 7476-7479; 6330(d); 6015(e); 7436.

20 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).

21 IRC § 7422(a).

22 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).

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

## ANALYSIS OF PRO SE LITIGATION

As in previous years, many taxpayers appeared before the courts *pro se*. Figure 3.0.1 lists the Most Litigated Issues for the review period June 1, 2016 through May 31, 2017, 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 summons enforcement and family status issues.

**FIGURE 3.0.1, Pro Se Cases By Issue**

Most Litigated Issue	Litigated Cases Reviewed	Pro Se Litigation	Percentage of Pro Se Cases
Accuracy-Related Penalty	138	84	61%
Trade or Business Expenses	99	62	63%
Summons Enforcement	89	64	72%
Collection Due Process	85	46	54%
Gross Income	85	57	67%
Failure to File, Failure to Pay, and Estimated Tax Penalties	60	39	65%
Civil Actions to Enforce Federal Tax Liens or to Subject Property to Payment of Tax	60	30	50%
Charitable Deductions	28	14	50%
Family Status Issues	24	19	79%
Relief from Joint and Several Liability	24	15	63%
<b>Total</b>	<b>692</b>	<b>430</b>	<b>62%</b>

Figure 3.0.2 affirms our contention that taxpayers are more likely to prevail if they are represented. *Pro se* taxpayers prevailed in 15 percent of cases this year as compared to 17 percent last year, a two percent decrease in success rate. Thus, for this year, the success rate for represented taxpayers was nine percent greater than that of *pro se* taxpayers.

FIGURE 3.0.2, Outcomes For *Pro Se* and Represented Taxpayers

Most Litigated Issue	Pro Se Taxpayers			Represented Taxpayers		
	Total Cases	Taxpayer Prevalled in whole or in part	Percent	Total Cases	Taxpayer Prevalled in whole or in part	Percent
<b>Accuracy-Related Penalty</b>	84	14	17%	54	13	24%
<b>Trade or Business Expenses</b>	62	19	31%	37	15	41%
<b>Summons Enforcement</b>	64	0	0%	25	6	24%
<b>Collection Due Process</b>	46	4	9%	39	3	8%
<b>Gross Income</b>	57	10	18%	28	8	29%
<b>Failure to File, Failure to Pay, and Estimated Tax Penalties</b>	39	6	15%	21	6	29%
<b>Civil Actions to Enforce Federal Tax Liens or to Subject Property to Payment of Tax</b>	30	0	0%	30	2	7%
<b>Charitable Deductions</b>	14	3	21%	14	5	36%
<b>Family Status Issues</b>	19	4	21%	5	1	20%
<b>Relief from Joint and Several Liability</b>	15	5	33%	9	3	33%
<b>Total</b>	<b>430</b>	<b>65</b>	<b>15%</b>	<b>262</b>	<b>62</b>	<b>24%</b>

## ANALYSIS OF UNPUBLISHED OPINIONS

We identified 108 bench orders and 473 summary judgments<sup>24</sup> by searching the Tax Court orders on its website.<sup>25</sup> We identified 93 of 108 bench orders and 109 of 473 summary judgments associated with this cycle's ten Most Litigated Issues. These 202 cases are listed in Tables 11 and 12 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.<sup>26</sup> The most prevalent issues discussed in the bench opinions reviewed were gross income (32 cases or about 34 percent), trade or business expenses (25 cases or about 27 percent), accuracy-related penalty (25 cases or about 27 percent), family status issues (17 cases or 18 percent), and CDP issues (15 cases or 16 percent).

Over three-fourths (77 percent) of the 473 summary judgment orders we reviewed were procedural and did not discuss a substantive tax law issue. In contrast to bench opinions, CDP matters dominated this category of unpublished litigation, with 84 percent (92 cases) of the selected summary judgments. Notably 41 percent (45 cases) of summary judgments were entered by default as taxpayers did not file

24 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.

25 We used 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).

26 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.

a response to the IRS's motion for summary judgment despite the court order to respond. Forty one percent of petitioners in summary judgment cases failed to provide the IRS with requested financial information to consider collection alternatives during the CDP hearing with the IRS Office of Appeals prior to filing a petition in the Tax Court.

Overall, the IRS prevailed in 89 percent of motions for summary judgment (97 cases) and in about 70 percent of bench opinions (65 cases). Split decisions resulted in seven percent (eight of 109) of summary judgment orders and in 17 percent (16 of 93) of bench opinions. Four taxpayers who prevailed in summary judgment cases were represented. Twelve taxpayers prevailed in bench opinions, nine of these taxpayers appeared *pro se*, three were represented. Overall, 80 percent (161 cases) of taxpayers appeared *pro se* in the unpublished opinions reviewed.<sup>27</sup>

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<sup>27</sup> See Appendix 3 (cite to appendix), *infra*.