

Introduction

OVERVIEW

IRC § 7803(c)(2)(B)(ii)(XI) requires the National Taxpayer Advocate to identify in her Annual Report to Congress (ARC) the ten tax issues most litigated in federal courts (MLIs).¹

TAS identified the MLIs from June 1, 2019, through May 31, 2020, using commercial legal research databases. This section of the Annual Report defines the term “litigated” as cases in which the court issued an opinion.² This year’s MLIs are, in order from most to least cases:

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

Summons enforcement saw the greatest decrease since last year, dropping from 60 cases to 40 (a 33 percent decrease). Civil actions to enforce federal tax liens or to subject property to payment of tax was the only category that reflected an increase in the number of cases, from 52 cases to 71 (a nearly 37 percent increase). Overall, taxpayers prevailed in full or in part in 74 cases (about 16 percent), consistent with last year. Cases involving individual taxpayers outnumbered business taxpayers by a ratio of 3:2.⁴

We analyzed each issue in five sections: taxpayer rights impacted,⁵ overview of findings, analysis of the litigated cases, conclusion, and recommendations to mitigate disputes. 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 one-year period that we used in previous reports for the ten MLIs, ending on May 31, 2020.

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. This year, we did not include bench orders or summary judgments in this report.

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 analyzed only subsections (b)(1), and (2).

4 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.

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

This year the top ten MLIs included a total of 455 court opinions. That's the least number of cases we've identified since 2002.⁶ Some of the 15 percent decrease in the total number of cases from last year can be attributed to court closures related to the COVID-19 pandemic;⁷ however, this decrease follows a general decline in the number of litigated cases since the Great Recession. We recorded more than twice as many cases in 2007, 2008, and 2009 as we did this year. We may again see a surge in tax litigation in the wake of the pandemic's economic turmoil in years to come.

TAX LITIGATION

A variety of courts share concurrent jurisdiction over federal tax litigation. They include Article I (*i.e.*, special courts created by Congress) and Article III (*i.e.*, constitutional courts). Litigation generally includes an automatic right of appeal to the United States Courts of Appeals,⁸ although some taxpayers elect to give up their appeal rights and pursue binding but less formal proceedings, pursuant to court rules.⁹ The taxpayer's choice of judicial forum depends on many factors, including whether the taxpayer is required to pre-pay the tax prior to litigation, the court's procedures, the burden of proof, and the controlling precedent. Tax litigation takes place in:

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

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 full¹⁰ and (2) the taxpayer has filed an administrative claim for refund.¹¹ The United States district courts, along with the bankruptcy courts in very limited circumstances, provide the only fora in which a taxpayer can request a jury trial.¹² Bankruptcy courts can adjudicate tax matters not adjudicated prior to the initiation of a bankruptcy case.¹³

Congress created the Tax Court as a forum where taxpayers can bring suit to contest IRS proposed assessments and determinations without prepayment.¹⁴ It has jurisdiction over a variety of issues, including deficiencies,

6 Our MLIs section in our first two reports (2000 and 2001 Annual Report to Congress) reviewed cases by sampling.

7 See, e.g., <https://www.ustaxcourt.gov/covid.html>.

8 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. See 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).

9 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.

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 2021 Purple Book, *Compilation of Legislative Recommendations to Strengthen Taxpayer Rights and Improve Tax Administration (Repeal Flora and Expand the Tax Court's Jurisdiction: Give Taxpayers Who Cannot Pay the Same Access to Judicial Review as Those Who Can)*.

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).

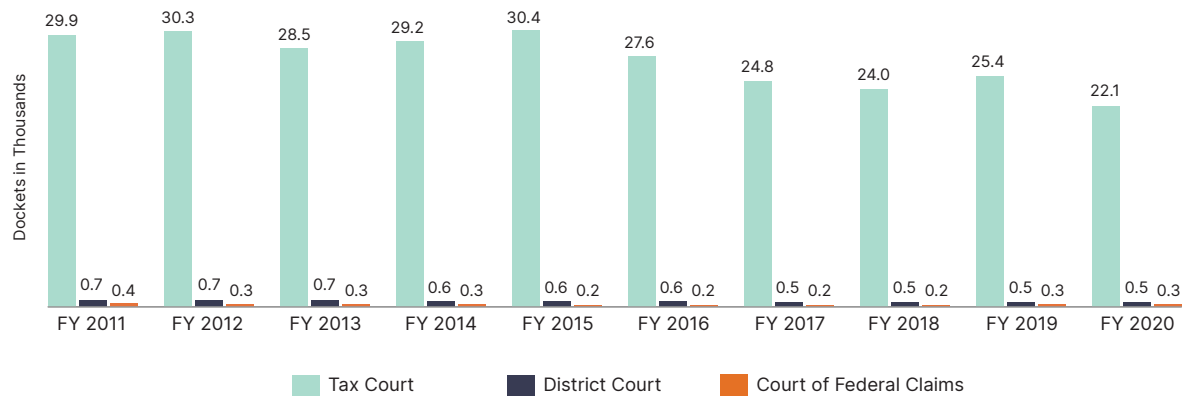
14 See IRC § 7441.

certain declaratory judgment actions, appeals from administrative hearings, relief from joint and several liability, and determination of employment status.¹⁵ The Tax Court is the only “prepayment” forum which is one major advantage for taxpayers as they can adjudicate the merits of the issue without paying the disputed tax in advance. As a result, over 96 percent of all tax-related litigation is adjudicated in the Tax Court.

Comparing the number of dockets (*i.e.*, petitions filed with the court), the Tax Court receives at least 40 times as many cases as district courts, and 70 times as many cases as the Court of Federal Claims. Figure 2.0.1 compares the number of docketed cases in inventory in the Tax Court, the Court of Federal Claims, and the district courts at the end of the past ten fiscal years (FYs).¹⁶

FIGURE 2.0.1¹⁷

Docketed Inventory in Tax Court, District Court, and Court of Federal Claims, FYs 2011-2020



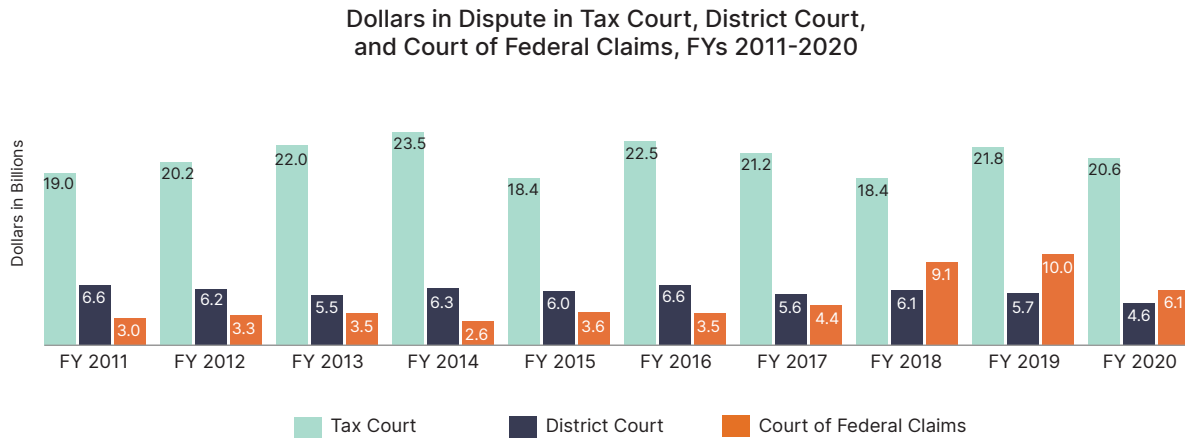
While the Tax Court docketed the lion’s share of cases, there tends to be more money at stake in tax litigation in the district courts and the Court of Federal Claims. Comparing the dollars in dispute, Tax Court cases compare about 4:1 to district courts, and about 3:1 to the Court of Federal Claims. Figure 2.0.2 shows the dollars in dispute for the docketed case inventory in these courts over the past ten fiscal years.

¹⁵ IRC §§ 6214, 7476-7479, 6330(d), 6015(e), and 7436.

¹⁶ A fiscal year runs from October 1 to September 30 of the following calendar year and is different than the reporting period used for the ten MLIs in this report - June 1, 2019, through May 31, 2020.

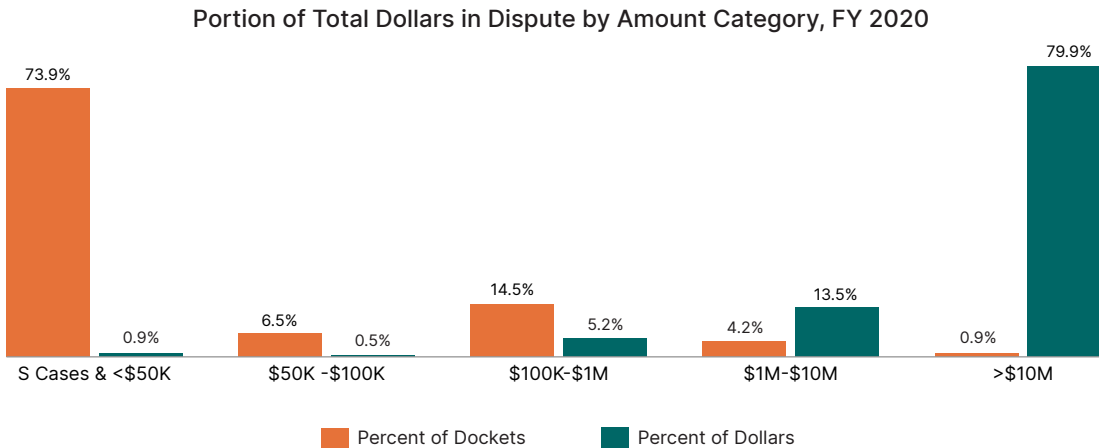
¹⁷ IRS, Counsel Automated Tracking System, TL-711 and TL-712. Does not include cases on appeal and declaratory judgments. Note that this figure covers fiscal years (October 1 – September 30), while MLI review in this report covers the period June 1 – May 31.

FIGURE 2.0.2¹⁸



Looking more closely at the Tax Court cases during FY 2020, we see that in nearly 74 percent of the cases, there was less than \$50,000 at stake. Figure 2.0.3 shows the breakdown of FY 2020 Tax Court cases by dollars in dispute.

FIGURE 2.0.3¹⁹



¹⁸ IRS, Counsel Automated Tracking System, TL-711 and TL-712. Does not include cases on appeal and declaratory judgments. Note that this figure covers fiscal years (October 1 – September 30), while MLI review in this report covers the period June 1 – May 31.

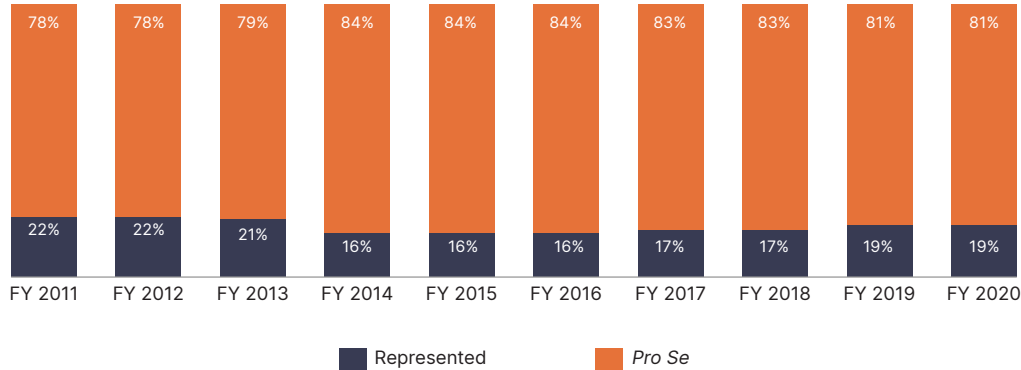
¹⁹ IRS, Counsel Automated Tracking System, TL-711. Does not include cases on appeal and declaratory judgments.

ANALYSIS OF PRO SE LITIGATION

Over the past ten years, an average of 82 percent of taxpayers appearing in Tax Court are not represented by counsel.²⁰ There is no doubt that self-represented taxpayers are disadvantaged in tax litigation as they are unfamiliar with the Court’s Rules of Practice and Procedure, Rules of Evidence, and the nuances of negotiating with the IRS. The dollars at issue, along with the taxpayer’s income level, are two key determinants of whether a taxpayer obtains representation to navigate the litigation process. Hiring a representative can be expensive. And even if a taxpayer has the means to do so, the amount at issue may not justify the cost. In an effort to ameliorate this difference, more than 25 years ago the Tax Court instituted Tax Clinics and Bar Sponsored Calendar Call programs which provide important advice and assistance to many low income, self-represented taxpayers.²¹ The Calendar Call Program enables eligible taxpayers to seek legal advice and representation at a trial session. Low Income Taxpayer Clinics provide free or low-cost representation to qualifying taxpayers,²² however only a fraction of eligible taxpayers avails themselves of those services. When a taxpayer appears before the court without a representative, it’s called *pro se*.²³ Figure 2.0.4 compares the ratio of Tax Court cases where taxpayers proceeded *pro se* to the cases where taxpayers appeared with a representative over the past ten FYs.

FIGURE 2.0.4²⁴

Proportion of Cases Petitioned to the Tax Court (Represented/*Pro Se*), FYs 2011-2020



We identify the top ten MLIs based on the number of opinions for each issue by using commercial legal research databases. This provides a high-level perspective on tax litigation, although it’s important to note that the overwhelming majority of petitions filed in the Tax Court are resolved without the necessity of trial or issuance of an opinion. Figure 2.0.5 shows the number of Tax Court petitions over the past ten fiscal years, broken down by whether the taxpayers proceeded *pro se* or with a representative.

20 Counsel Automated Tracking System, TL-708A. Note that this figure covers fiscal years (October 1 – September 30), while MLI review in this report covers the period June 1 – May 31.

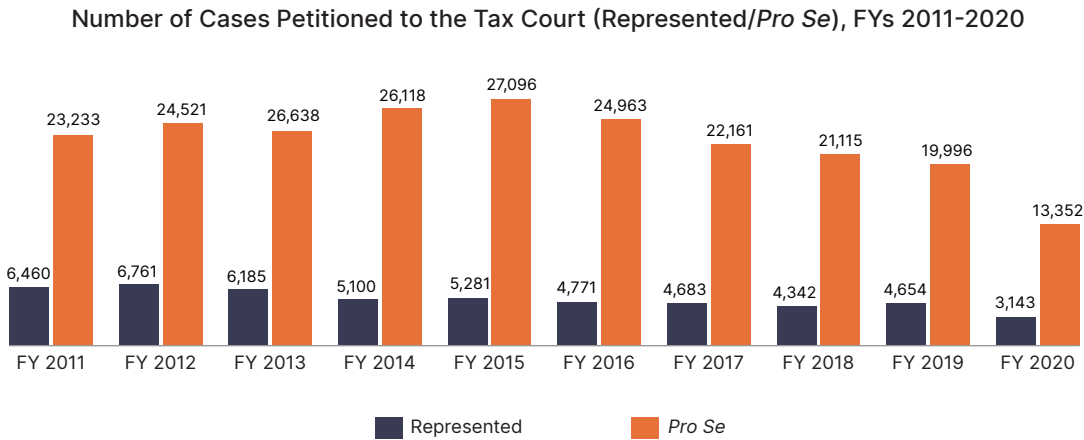
21 See <https://www.ustaxcourt.gov/clinics.html>. The Tax Court continues to invite academic and nonacademic tax clinics and bar-sponsored programs to consider participating and representing *pro se* taxpayers.

22 See IRC § 7526.

23 “*Pro se*” means “for oneself; on one’s own behalf; without a lawyer.” BLACK’S LAW DICTIONARY (11th ed. 2014).

24 IRS, Counsel Automated Tracking System, TL-708A. Does not include cases on appeal and declaratory judgments. Note that this figure covers fiscal years (October 1 – September 30), while MLI review in this report covers the period June 1 – May 31.

FIGURE 2.0.5²⁵



Focusing our analysis on court opinions provides a real-time snapshot for determining any current trends and potential causes, and proposing solutions to mitigate future litigation. The opinions illustrate the IRS’s successes in litigation and the parties’ successes in settling a large percentage of issues thereby avoiding trial. The IRS settles about 80 percent of cases petitioned to Tax Court.²⁶ In litigation, the IRS consistently achieves the majority of favorable outcomes in the opinions across all issues, whether the taxpayer is represented or not. However, represented taxpayers will likely achieve a better outcome than *pro se* taxpayers.²⁷ Figure 2.0.6 affirms that taxpayers are more likely to prevail if they are represented. Also noteworthy is that there were 66 percent more opinions this year involving *pro se* taxpayers than represented taxpayers. Only 12 percent of *pro se* taxpayers prevailed in full or in part, compared to 23 percent of represented taxpayers in the cases we identified for this reporting period. In four of the ten categories, the only taxpayers that achieved a favorable outcome were represented. One explanation for this disparity could be that represented taxpayers may be more likely to resolve their dispute through an administrative remedy or by reaching a settlement with IRS Counsel prior to trial, obviating the need for a court opinion on the matter.

²⁵ IRS, Counsel Automated Tracking System, TL-708A. Does not include cases on appeal and declaratory judgments. Note that this figure covers fiscal years (October 1 – September 30), while MLI review in this report covers the period June 1 – May 31.
²⁶ IRS, Counsel Automated Tracking System, TL-711.
²⁷ 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.

FIGURE 2.0.6, Outcomes for *Pro Se* and Represented Taxpayers²⁸

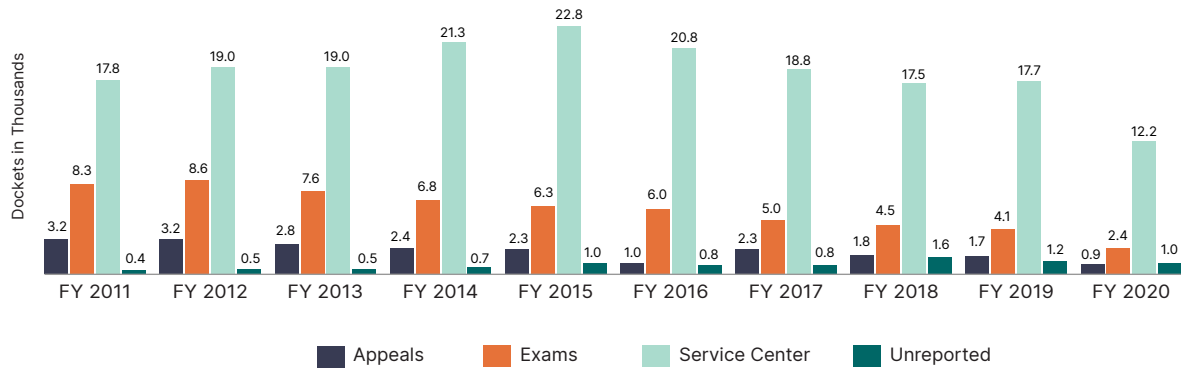
Most Litigated Issue	<i>Pro Se</i> Taxpayers			Represented Taxpayers		
	Total Cases	Taxpayer Prevailed in Full or in Part	Percent of Wins	Total Cases	Taxpayer Prevailed in Full or in Part	Percent of Wins
Collection Due Process	45	4	9%	29	6	21%
Civil Actions to Enforce Federal Tax Liens or to Subject Property to Payment of Tax	44	4	9%	27	6	22%
Accuracy-Related Penalty	37	12	32%	27	7	26%
Trade or Business Expenses	41	11	27%	23	10	43%
Gross Income	46	4	9%	16	2	13%
Summons Enforcement	22	0	0%	18	1	6%
Failure to File, Failure to Pay, and Estimated Tax Penalties	20	0	0%	11	1	9%
Schedule A Deductions	12	0	0%	9	4	44%
Charitable Deductions	3	0	0%	11	2	18%
Frivolous Issues	14	0	0%	0	0	0%
Total	284	35	12%	171	39	23%

Where appropriate, each of the MLI sections that follow include recommendations to reduce the need for litigation. However, they all share one common element: litigation only occurs when there is a failure to reach a resolution at the administrative level. Figure 2.0.7 shows Tax Court petition filing over the last ten FYs based on the IRS function that issued the notice attached to each petition. The statutory notice of deficiency is the “ticket to Tax Court” and the document which starts the procedural clock for timely filing a petition.

²⁸ This figure covers the period June 1, 2019 – May 31, 2020. Some of the 13 percent decrease in the total number of cases from the last reporting period can be attributed to court closures related to the COVID-19 pandemic. See, e.g., <https://www.ustaxcourt.gov/covid.html>.

FIGURE 2.0.7²⁹

Source of Cases Petitioned to the Tax Court (Appeals/Exams/Service Center), FYs 2011-2020



A high percentage of petitions in the Tax Court result from a statutory notice of deficiency being issued from the IRS Service Centers (Campuses) bypassing Appeals, as shown in Figure 2.0.7. There are a variety of reasons that can trigger the issuance of the statutory notice of deficiency at the Campus: a taxpayer may not have understood the IRS correspondence or may not have provided timely or sufficient documentation; or the IRS needed to issue the statutory notice of deficiency to protect the period of limitations.

When the case originates at a Campus, a taxpayer may not have spoken with an IRS employee prior to filing a Tax Court petition.³⁰ Taxpayers may have had difficulty reaching an IRS employee that could assist in the process, or the IRS may not have been able to contact the taxpayer. Many of those taxpayers may miss an opportunity for achieving a resolution at the administrative level, prior to seeking Tax Court review. This is an area our office plans on reviewing this year.

²⁹ IRS, Counsel Automated Tracking System, TL-708B. This includes declaratory judgments. The unreported category includes cases where no statutory notice was attached to the petition. Note that this figure covers fiscal years (October 1 – September 30), while MLI review in this report covers the period June 1 – May 31.

³⁰ See *Most Serious Problem: Correspondence Exams: Taxpayers Encounter Unnecessary Delays and Difficulties Reaching an Accountable and Knowledgeable Contact for Correspondence Audits*, *supra*.