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).[1] The National Taxpayer Advocate may analyze these issues to develop recommendations to mitigate the disputes resulting in litigation.

TAS identified the Most Litigated Issues (MLI) from June 1, 2014, through May 31, 2015, 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 MLI are:

- Accuracy-Related Penalty Under IRC § 6662(b)(1) and (2);[3]
- Trade or Business Expenses Under IRC § 162 and Related Sections;
- Summons Enforcement Under IRC §§ 7602, 7604, and 7609;
- Gross Income Under IRC § 61 and Related Sections;
- Appeals from Collection Due Process (CDP) Hearings Under IRC §§ 6320 and 6330;
- Failure to File Penalty Under IRC § 6651(a)(1), Failure to Pay an Amount Shown as Tax on Return Penalty Under IRC § 6651(a)(2), and Failure to Pay Estimated Tax Penalty Under IRC § 6654;
- Civil Actions to Enforce Federal Tax Liens or to Subject Property to Payment of Tax Under IRC § 7403;
- Charitable Deductions Under IRC § 170;
- Frivolous Issues Penalty Under IRC § 6673 and Related Appellate-Level Sanctions; and
- Relief from Joint and Several Liability Under IRC § 6015.

All of these issues were identified as MLIs last year, with the exception of relief from joint and several liability for spouses.[4] This issue has appeared in previous MLI sections, most recently in 2013.[5] Accuracy-related penalties remained the top issue this year, although we identified 40 fewer cases than the 153 cases identified last year.[6] This works out to a 26 percent decrease, the largest drop in any category of cases. Summons enforcement cases experienced the second largest percentage decrease, as we identified 84 cases this year and 102 last year, an 18 percent decrease.[7] Cases involving civil actions to enforce federal tax liens or to subject property to payment of tax and trade or business expenses also decreased from previous

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)(4), (5), (6), and (7), but because those types of accuracy-related penalties were not heavily litigated, we have only analyzed (b)(1), (2), and (3).

4 *See* National Taxpayer Advocate 2014 Annual Report to Congress 423.

5 *See* National Taxpayer Advocate 2013 Annual Report to Congress 322.

6 *See* National Taxpayer Advocate 2014 Annual Report to Congress 443.

7 *Id*. at 462.

year figures by 15 percent and 14 percent, respectively.[8] Overall, the total number of cases identified in the MLIs dropped from 731 in 2014 to 640 this year, a 12 percent decrease from last year and a 27 percent decrease from the 877 cases identified in 2013.[9] Although there has been a decline in the number of cases over the last two years, the relative percentage of cases involving *pro se* taxpayers has remained consistent, with 62 percent this year, as compared to the same percentage last year and 63 percent in 2013.[10]

Once TAS identified the MLI, we analyzed each one in five sections: summary of findings, taxpayer rights impacted, description of present law, analysis of the litigated cases, and conclusion. The taxpayer rights impacted section is new for the MLIs section this year and reflects the relevance of the Taxpayer Bill of Rights (TBOR), which was adopted by the IRS last year on the National Taxpayer Advocate's recommendation.[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 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.[14] This year, the Significant Cases discussion includes two decisions issued by the Supreme Court that impact tax adminstration issues and a circuit court of appeals decision that directly affects TAS.[15]

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.

8 *See* National Taxpayer Advocate 2014 Annual Report to Congress 503; National Taxpayer Advocate 2014 Annual Report to Congress 453.

9 *Id*. at 425; National Taxpayer Advocate 2013 Annual Report to Congress 324.

10 *Id.*

11 *See* TBOR, *available at* www.TaxpayerAdvocate.irs.gov/taxpayer-rights; National Taxpayer Advocate 2013 Annual Report to Congress 5 (Most Serious Problem: *Taxpayer Rights: The IRS Should Adopt a Taxpayer Bill of Rights as a Framework for Effective Tax Administration*).

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.

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 Three of the cases discussed in the "Significant Cases" section of this report were decided outside the June 1, 2014, through May 31, 2015, period used to identify the ten most litigated issues, but we nonetheless have included these cases because of their impact on tax administration.

15 *King v. Burwell*, 135 S. Ct. 2480 (June 25, 2015), *aff'g* 759 F.3d 358 (4th Cir. 2014), *aff'g sub. nom. King v. Sebelius*, 997 F. Supp. 2d 415 (E.D. Va. 2014); *Obergefell v. Hodges*, 135 S. Ct. 2584 (June 26, 2015); *Rothkamm v. U.S.*, No. 14-31164, slip op. (5th Cir. 2015), — F.3d —, 116 A.F.T.R. 2d 2015-6198 (2015), *rev'g and remanding*, 114 A.F.T.R. 2d (RIA) 5997, 2014-2 U.S. Tax Cas. (CCH) P50,441 (M.D. La. 2014).

With limited exceptions, taxpayers have an automatic right of appeal from the decisions of any of these courts.[16]

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.[17]

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,[18] and (2) the taxpayer has filed an administrative claim for refund.[19] 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.[20] Bankruptcy courts can adjudicate tax matters that were not adjudicated prior to the initiation of a bankruptcy case.[21]

16 *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). *See also Byers v. Comm'r*, 740 F.3d 668 (D.C. 2014), *cert. denied*, 83 U.S.L.W. 3189 (U.S. Oct. 6, 2014) (No. 14-74) (the D.C. Circuit will not transfer cases to another circuit in non-liability CDP cases unless both parties stipulate to transfer the case).

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

18 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).

19 IRC § 7422(a).

20 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).

21 *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, 2014, through May 31, 2015, 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 the frivolous issues penalty.

FIGURE 3.0.1, *Pro Se* Cases by Issue

Most Litigated Issue	Litigated Cases Reviewed	*Pro Se* Litigation	% of Cases Involving *Pro Se* Taxpayers
Accuracy-Related Penalty	113	68	60%
Trade or Business Expenses	99	60	61%
Summons Enforcement	84	61	73%
Gross Income	80	53	66%
Collection Due Process	79	46	58%
Failure to File, Failure to Pay, and Estimated Tax Penalties	63	41	65%
Civil Actions to Enforce Federal Tax Liens or to Subject Property to Payment of Tax	44	18	41%
Charitable Deductions	28	14	50%
Frivolous Issues Penalty (and analogous appellate-level sanctions)	26	24	92%
Relief From Joint and Several Liability	24	11	46%
Total	**640**	**396**	**62%**

Figure 3.0.2 affirms our contention that taxpayers are more likely to prevail if they are represented. The disparity in the success rate between *pro se* and represented taxpayers is much less than last year. *Pro se* taxpayers prevailed in 19 percent of cases this year as compared to ten percent last year, a remarkable 90 percent increase in success rate. Represented taxpayers fared slightly better than last year, achieving a 28 percent success rate as compared to 26 percent last year, an eight percent increase.

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

	Pro Se Taxpayers			Represented Taxpayers		
Most Litigated Issue	Total Cases	Taxpayer Prevailed in whole or in part	Percent	Total Cases	Taxpayer Prevailed in whole or in part	Percent
Accuracy-Related Penalty	68	14	21%	45	12	27%
Trade or Business Expenses	60	23	38%	39	19	49%
Summons Enforcement	61	1	2%	23	2	9%
Gross Income	53	7	13%	27	10	37%
Collection Due Process	46	5	11%	33	9	27%
Failure to File, Failure to Pay, and Estimated Tax Penalties	41	7	17%	22	4	18%
Civil Actions to Enforce Federal Tax Liens or to Subject Property to Payment of Tax	18	0	0%	26	4	15%
Charitable Contributions	14	5	36%	14	5	36%
Frivolous Issues Penalty (and analogous appellate-level sanctions)	24	7	29%	2	0	0%
Relief From Joint and Several Liability	11	5	45%	13	4	31%
Total	**396**	**74**	**19%**	**244**	**69**	**28%**