



## MOST LITIGATED ISSUES

### OVERVIEW

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 and make recommendations to mitigate 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 U.S. Courts of Appeals,<sup>1</sup> although some taxpayers elect to give up their appeal rights and pursue binding but less formal proceedings.<sup>2</sup> The taxpayer's choice of judicial forum depends on many factors, including whether the taxpayer is required to prepay the tax before litigation, the court's procedures, the burden of proof, and the controlling precedent. Tax litigation takes place in:

- U.S. Tax Court;
- U.S. district courts;
- U.S. Court of Federal Claims;
- U.S. Courts of Appeals;
- U.S. Bankruptcy Courts; and
- U.S. Supreme Court.

<sup>1</sup> 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 Tax Court. There are exceptions to this general rule. See also 28 U.S.C. § 1294 (appeals from a U.S. district court are 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).

<sup>2</sup> 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.

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>3</sup> and (2) the taxpayer has filed an administrative claim for refund.<sup>4</sup> The U.S. district courts, along with the bankruptcy courts in very limited circumstances, provide the only forum in which a taxpayer can request a jury trial.<sup>5</sup> Bankruptcy courts can adjudicate tax matters not adjudicated before filing a bankruptcy case.<sup>6</sup>

Congress created the U.S. Tax Court (Tax Court) as a forum where taxpayers can bring suit to contest IRS-proposed assessments and determinations without prepayment.<sup>7</sup> It has jurisdiction over a variety of tax issues, including deficiencies, certain declaratory judgment actions, appeals from administrative hearings, relief from joint and several liability, and determination of employment status.<sup>8</sup> The Tax Court is a “prepayment” forum, which is one major advantage for taxpayers as their case can be adjudicated on the merits without paying the disputed tax in advance.<sup>9</sup> In fiscal year (FY) 2024, the Tax Court adjudicated 97 percent (23,468 of 24,136 cases) of all tax-related litigation.<sup>10</sup>

To identify the top ten Most Litigated Issues, TAS used commercial legal research databases to locate and review published opinions involving a substantive civil tax issue decided on the merits in federal courts during the FY 2024 period from October 1, 2023, through September 30, 2024 (the reporting period).

We also reviewed the statutory notices of deficiency regarding which petitions taxpayers filed with the Tax Court during the reporting period. A statutory notice of deficiency, also called a notice of deficiency, a 90-day letter, or ticket-to-Tax Court, is a legal notice in which the IRS Commissioner determines a taxpayer’s tax deficiency. IRC § 6212 requires the IRS to issue a statutory notice of deficiency before assessing additional income tax, estate tax, gift tax, and certain excise taxes unless the taxpayer agrees to the additional assessment. A statutory notice of deficiency also starts the 90-day period in which the taxpayer can file a petition with the Tax Court.<sup>11</sup>

3 28 U.S.C. § 1346(a)(1). See *Flora v. United States*, 362 U.S. 145 (1960). See also National Taxpayer Advocate 2025 Purple Book, *Compilation of Legislative Recommendations to Strengthen Taxpayer Rights and Improve Tax Administration (Expand the U.S. Tax Court’s Jurisdiction to Hear Refund Cases)*.

4 IRC § 7422(a).

5 The bankruptcy courts 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).

6 See 11 U.S.C. § 505(a)(1), (a)(2)(A).

7 See IRC § 7441.

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

9 IRC § 6213(a). For example, a taxpayer who wishes to contest an IRS determination in a statutory notice of deficiency can do so in the Tax Court without needing to pay the disputed tax first; in contrast, if the taxpayer wanted to file a suit for refund in another forum, such as a U.S. district court, the taxpayer must generally prepay the entire amount in dispute.

10 Data compiled by the IRS Office of Chief Counsel (Nov. 8, 2024); IRS, Counsel Automated Tracking System, TL-711 and TL-712. Does not include cases on appeal and declaratory judgments.

11 Note that if the statutory notice of deficiency “is addressed to a person outside of the United States,” the period for filing a petition with the Tax Court is 150 days from the date of mailing instead of 90 days. See IRC § 6213(a). The Tax Court has construed this language broadly, concluding among other things that the 150-day period for filing a petition applies when a notice of deficiency is mailed to an address outside the United States as well as when a notice of deficiency is mailed to an address within the United States, but the taxpayer is located outside the United States. See, e.g., *Levy v. Comm’r*, 76 T.C. 228 (1981) (holding that the 150-day rule is applicable to a U.S. resident who is temporarily outside of the country when the notice is mailed and delivered); *Looper v. Comm’r*, 73 T.C. 690 (1980) (holding that the 150-day rule is applicable where a notice is mailed to an address outside the United States); *Lewy v. Comm’r*, 68 T.C. 779 (1977) (holding that the 150-day rule is applicable to a foreign resident who is in the United States when the notice is mailed but outside the United States when the notice is delivered); *Hamilton v. Comm’r*, 13 T.C. 747 (1949) (holding that the 150-day rule is applicable to a foreign resident who is outside the United States when the notice is mailed and delivered).

## METHODOLOGY

Our analysis identified 414 court opinions, with 174 opinions issued by the Tax Court in the reporting period.<sup>12</sup> We also reviewed 240 court opinions from other federal courts, including U.S. district courts, U.S. Courts of Appeals, U.S. Court of Federal Claims, U.S. Bankruptcy Courts, and the U.S. Supreme Court.<sup>13</sup> The total number of opinions represents a 15 percent decrease from the 488 cases we identified last year.<sup>14</sup>

The second part of our analysis reviewed 16,117 petitions submitted by taxpayers in FY 2024 seeking judicial review in the Tax Court to identify the issues appearing most frequently, using data provided by the IRS Independent Office of Appeals (Appeals).<sup>15</sup> Only a small fraction of petitions results in a trial or court ruling on the merits. Of the 23,280 cases closed in the Tax Court in FY 2024, 23,095 cases, or more than 99 percent, were resolved due to a settlement or default without requiring a trial on the merits.<sup>16</sup> We identified the issues in statutory notices of deficiency to determine the unagreed audit issues.<sup>17</sup> Our research team compiled the data for our analysis using information from the Compliance Data Warehouse (CDW), Individual Master File (IMF) Transaction History table for FY 2024, and the Examination Operational Automation Database.

## MOST LITIGATED ISSUES IN TAX COURT OPINIONS

We reviewed all Tax Court opinions issued during FY 2024 that ruled on the merits of a substantive tax issue to identify the top ten Most Litigated Issues in the Tax Court. We identified the issues before the court and whether the litigant was an individual or business taxpayer. Tax Court cases involving individual taxpayers (95 cases) outnumbered business taxpayers (79 cases).

**FIGURE 3.1, Top Tax Court Opinions Issued for Individual Taxpayers, FY 2024<sup>18</sup>**

Ranking	Issue Category	Tax Court Opinions Discussing Issue
1	Gross Income (IRC § 61 and Related IRC Sections) and Unreported/Underreported Income	18
2	Innocent Spouse Relief (IRC § 6015)	10
3	Deadline for Filing a Petition in Tax Court (IRC §§ 6213(a), 6015(e))	7
4	Whistleblower Award Determinations (IRC § 7623(b)(1))	6
5	Adjusted Gross Income (AGI) Exclusions and Deductions	5 (tie)
6	Schedule A Deductions (Excluding IRC § 170)	5 (tie)

(continued on next page)

12 Our analysis does not include cases on appeal and declaratory judgments.

13 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. We did not include bench orders and summary judgments in this report.

14 National Taxpayer Advocate 2023 Annual Report to Congress 144 (Most Litigated Issues), [https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2024/02/ARC23\\_MostLitigatedIssues.pdf](https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2024/02/ARC23_MostLitigatedIssues.pdf).

15 IRS response to TAS information request (Nov. 11, 2024) (showing totals of petitions to the Tax Court during FY 2024).

16 Data compiled by the IRS Office of Chief Counsel (Nov. 11, 2024); IRS, Counsel Automated Tracking System, TL-711. Inventory pending as of September 30, 2024.

17 IRS response to TAS information request (Nov. 11, 2024). TAS matched this data to information from CDW, IMF Transaction History table for FY 2024, and the Examination Operational Automation Database (Nov. 2024).

18 In cases of a tie between categories, we listed them in alphabetical order. Some opinions resolved multiple substantive tax issues in the same opinion. We removed Collection Due Process (CDP) hearings cases, accuracy-related penalties, fraud penalties, and managerial approval of penalties from this list and separately discuss them under *Other Issues, infra*.

## Most Litigated Issues

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)	3
8	Foreign Earned Income Exclusion (FEIE) (IRC § 911)	2 (tie)
9	Gift Tax (IRC § 2501)	2 (tie)
10	Limitations on Assessment Period (IRC § 6501)	2 (tie)
11	Ten Percent Additional Tax on Early Distributions From Qualified Retirement Plans (IRC § 72(t))	2 (tie)

**FIGURE 3.2, Top Tax Court Opinions Issued for Business Taxpayers, FY 2024<sup>19</sup>**

Ranking	Issue Category	Tax Court Opinions Discussing Issue
1	Schedule C Income and Expenses	29
2	Corporate Income (Excluding Cost of Goods Sold) or Expenses	12
3	Charitable Contribution Deductions (IRC § 170)	9 (tie)
4	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)	9 (tie)
5	Partnership Income (Excluding Cost of Goods Sold) or Expenses	9 (tie)
6	Gross Income (IRC § 61 and Related IRC Sections)	7 (tie)
7	Schedule K-1 Flow-Through Items for Forms 1120-S and 1065	7 (tie)
8	Schedule A Deductions (Excluding IRC § 170)	5
9	Microcaptive Insurance Agreements (IRC § 832(b))	3 (tie)
10	Passive Activity (Schedule E) Income and Expenses	3 (tie)

## MOST LITIGATED ISSUES PETITIONED TO THE TAX COURT

We identified the top ten issues petitioned to the Tax Court to provide insight into the matters that taxpayers bring before the Tax Court and to allow us to compare those issues to the top ten issues that required a court ruling to resolve. We analyzed the issues appearing on the statutory notice of deficiency to determine the unagreed issues in each petition.<sup>20</sup>

Figure 3.3 shows this year's most petitioned issues to the Tax Court for individuals from most to least.<sup>21</sup>

<sup>19</sup> In cases of a tie between categories, we listed them in alphabetical order. Some opinions resolved multiple substantive tax issues in the same opinion. We removed CDP cases, accuracy-related penalties, fraud penalties, and managerial approval of penalties and separately discuss them under *Other Issues, infra*.

<sup>20</sup> IRS response to TAS information request (Nov. 11, 2024). TAS matched this data to information from CDW, IMF Transaction History table for FY 2024, and the Examination Operational Automation Database (Nov. 2024).

<sup>21</sup> We used IRS Standard Audit Industry Number (SAIN) codes designed to consistently track issues for tax administration to calculate our approach.

**FIGURE 3.3, Top Ten Individual Taxpayer Issues Petitioned to the Tax Court, FY 2024<sup>22</sup>**

Ranking	Issue Category	Total Petitions to Tax Court
1	Gross Income (IRC § 61 and Related IRC Sections)	13,986
2	Statutory Adjustment	4,121
3	Filing Status and Dependents	1,537
4	Family Status Related Credits	1,247
5	Payments and Credits	1,207
6	Earned Income Tax Credit (EITC)	1,181
7	AGI Exclusions and Deductions	1,089
8	Federal Income Tax Withholding	769
9	Schedule A Itemized Deductions (Excluding IRC § 170)	628
10	Charitable Contributions	358

Figure 3.4 shows this year's most petitioned issues to the Tax Court for businesses from most to least.<sup>23</sup>

**FIGURE 3.4, Top Ten Business Taxpayer Issues Petitioned to the Tax Court, FY 2024<sup>24</sup>**

Ranking	Issue Category	Total Petitions to Tax Court
1	Sole Proprietorship Trade or Business Expense	1,625
2	Sole Proprietorship Gross Income	1,009
3	Passive Activity (Schedule E) Income and Expenses	802
4	Payments and Other Credits	694
5	Corporate or Partnership Trade or Business Expense	436
6	Corporate or Partnership Gross Income	309
7	Employment Tax Issues	84
8	Schedule K-1 Flow-Through Items	82
9	Balance Sheet – Assets	42
10	Balance Sheet – Stockholder Equity	37

22 IRS response to TAS information request (Nov. 11, 2024). TAS matched this data to information from CDW, IMF Transaction History table for FY 2024, and the Examination Operational Automation Database (Nov. 2024). Statutory adjustments are automatically generated adjustments due to the correct application of the tax law, such as the statutory eligibility requirements (e.g., maximum allowable income) for claiming credits. We removed Impact of *De Minimus* Issues from this list, which came up in 2,361 petitions, because of the add-on nature of the category. We also removed the Accuracy-Related Penalty category and discuss it separately in *Other Issues, infra*.

23 Like Figure 3.3, we used IRS SAIN codes designed to consistently track issues for tax administration to calculate our approach.

24 IRS response to TAS information request (Oct. 25, 2024). TAS matched this data to information from CDW, IMF Transaction History table for FY 2024, and the Examination Operational Automation Database (Nov. 2024). The Payments and Other Credits category includes taxes on qualified retirement plans, including individual retirement accounts, Social Security and Medicare tax on tip income, and various credits such as the Retirement Savings Contribution Credit under IRC § 25B, mortgage interest credit under IRC § 25, and credits and carryforwards from alternative minimum tax under IRC § 55. We removed the Accuracy-Related Penalty category and discuss it separately in *Other Issues, infra*.

### Gross Income (IRC § 61 and Related IRC Sections)

As required under IRC § 7803(c)(2)(B)(ii)(XI), TAS has tracked the most litigated tax issues for more than 20 years, and controversies involving gross income and unreported or underreported income have been at or near the top of this list since the first report.<sup>25</sup> This year, it was the number one issue litigated in the Tax Court for individual taxpayers with 18 substantive opinions. This category had seven case opinions with business taxpayers. Like in FY 2023, this issue was also the largest category of cases with 13,986 individual taxpayers who petitioned the Tax Court.<sup>26</sup> Among business taxpayers, the second highest total was sole proprietorship gross income with 1,009 petitions and the sixth highest was corporate or partnership gross income with 309 taxpayers that petitioned the Tax Court.<sup>27</sup>

### Schedule A Deductions, Excluding Charitable Contribution Deductions (IRC § 170)

Itemized deductions reported on Schedule A of Form 1040 were frequently the subject of litigation for individual taxpayers and were among the ten most litigated issues for the eighth time since the National Taxpayer Advocate's 2000 Annual Report to Congress.<sup>28</sup> In FY 2024, we identified five opinions involving businesses and five opinions involving individuals in which itemized deductions were litigated in the Tax Court. We also identified 628 petitions filed in Tax Court in this category.<sup>29</sup>

### 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)

We identified and reviewed nine opinions involving businesses and three opinions involving individuals contesting the imposition of penalties and additions to tax for failure to timely file a tax return, failure to pay an amount shown as tax on a return, or underpayment of estimated taxes. A total of 132 taxpayers petitioned the Tax Court about these penalties and additions to tax.<sup>30</sup>

### Sole Proprietorships and Schedule C Income and Expenses

We identified and reviewed 29 business cases where this category of issues was litigated in the Tax Court. Taxpayers petitioned the Tax Court in 1,009 cases where sole proprietorship income was at issue and 1,625 cases where sole proprietorship trade or business expenses were at issue during the examination in FY 2024.<sup>31</sup> Sole proprietorship trade or business expenses was the most litigated issue for business taxpayers both in petitions to the Tax Court and opinions issued by the court after holding a trial in FY 2024. Trade or business deductions have been among the most litigated issues since TAS has tracked such activity.<sup>32</sup>

### Innocent Spouse Relief (IRC § 6015)

We identified ten opinions issued in the Tax Court during the reporting period where taxpayers challenged an IRS determination on innocent spouse relief under IRC § 6015. A taxpayer may seek relief from liability arising from a joint return if the taxpayer can prove the taxpayer's spouse or former spouse should be held solely liable under IRC § 6015. IRC § 6015 provides three ways for a taxpayer to obtain partial or full relief

25 See, e.g., National Taxpayer Advocate 2000 Annual Report to Congress 65, 69, 152 (Most Litigated Issues), <https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/pub2104-2000.pdf>.

26 IRS response to TAS information request (Oct. 25, 2024). TAS matched this data to information from CDW, IMF Transaction History table for FY 2024, and the Examination Operational Automation Database (Nov. 2024).

27 *Id.*

28 This year and in previous years, we have classified charitable contribution deductions separately as a Most Litigated Issue category.

29 We counted cases involving charitable contribution deductions separately under *Charitable Contribution Deductions*, *infra*. IRS response to TAS information request (Oct. 25, 2024). TAS matched this data to information from CDW, IMF Transaction History table for FY 2024, and the Examination Operational Automation Database (Nov. 2024).

30 IRS response to TAS information request (Oct. 25, 2024). TAS matched this data to information from CDW, IMF Transaction History table for FY 2024, and the Examination Operational Automation Database (Nov. 2024).

31 *Id.*

32 See, e.g., National Taxpayer Advocate 2000 Annual Report to Congress 70 (Most Litigated Issues), <https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/pub2104-2000.pdf>.

from a tax liability arising from a return filed jointly with a spouse or ex-spouse. IRC § 6015(b) provides relief for deficiencies arising from a jointly filed return. IRC § 6015(c) provides limited relief from a joint liability for spouses who are divorced, separated, widowed, or not living together by allocating the liability between the spouses. If relief is unavailable under IRC § 6015(b) or (c), IRC § 6015(f) provides a third opportunity for “equitable” relief from both deficiencies and underpayments. The issue does not appear within our analysis of petitions to the Tax Court because the IRS does not use a Standard Audit Industry Number code to specify innocent spouse claims.

### Adjusted Gross Income Exclusions and Deductions

We identified five cases where taxpayers in the individual category claimed a portion of their income could be excluded from the calculation of AGI and not subject to federal income tax. For example, these cases may involve claims under IRC § 104, which provides an exclusion from gross income for amounts received for personal injuries or sickness. In other cases, taxpayers claimed deductions for qualified retirement contributions under IRC § 219 or for certain unreimbursed employee business expenses. AGI deductions and exclusions was the seventh most litigated issue for individuals in petitions to the Tax Court with 1,089 petitions.<sup>33</sup>

### Whistleblower Award Determinations (IRC § 7623(b)(1))

Whistleblower award determinations under IRC § 7623(b)(1) made our list for the third consecutive year. We identified six opinions issued in the Tax Court where individuals challenged an IRS whistleblower award determination during the reporting period. The IRS Whistleblower Office pays monetary awards to eligible individuals if the IRS uses information from the whistleblower to take judicial or administrative action (*e.g.*, an audit or investigation) resulting in the collection of proceeds.<sup>34</sup> Taxpayers may appeal final determinations of the IRS Whistleblower Office regarding awards under IRC § 7623(b)(4) within 30 days of such determination.<sup>35</sup> In FY 2023, the Whistleblower Office issued 121 awards to whistleblowers totaling nearly \$89 million, which included 21 post-petition whistleblower awards under IRC § 7623(b).<sup>36</sup>

### Charitable Contribution Deductions (IRC § 170)

We identified nine opinions in business cases issued during the reporting period on the deductibility of charitable contributions under IRC § 170. Again this year, most of these cases arose due to the increased IRS focus on curtailing abuse in the syndicated conservation easement arena, including designating syndicated conservation easements as a listed transaction.<sup>37</sup> In FY 2024, charitable contribution deductions was the tenth most litigated among individual taxpayers with 358 taxpayers petitioning the Tax Court. It did not make our top ten list for businesses with 26 business taxpayers petitioning the Tax Court.<sup>38</sup>

33 IRS response to TAS information request (Oct. 25, 2024). TAS matched this data to information from CDW, IMF Transaction History table for FY 2024, and the Examination Operational Automation Database (Nov. 2024).

34 See IRS, Whistleblower Office, <https://www.irs.gov/compliance/whistleblower-office> (last visited Nov. 20, 2024).

35 See IRC § 7623(b)(4). See also Internal Revenue Manual (IRM) 25.2.2.8.2.2(7), IRC § 7623(b) Claims (May 28, 2020), [https://www.irs.gov/irm/part25/irm\\_25-002-002](https://www.irs.gov/irm/part25/irm_25-002-002).

36 See IRS, Pub. 5241, Fiscal Year 2023 Annual Report IRS Whistleblower Office (June 2024), <https://www.irs.gov/pub/irs-pdf/p5241.pdf>.

37 Syndicated conservation easement cases are counted in this category but may raise issues under other sections of the IRC, including IRC §§ 6111, 6707A, and 6662A. See IRS Notice 2017-10, 2017-4 I.R.B. 544, Syndicated Conservation Easement Transactions, [https://www.irs.gov/irb/2017-04\\_IRB#NOT-2017-10](https://www.irs.gov/irb/2017-04_IRB#NOT-2017-10). Note that some courts have ruled that the IRS lacks the authority to identify a listed transaction in a notice such as Notice 2017-10, but Treasury and the IRS continue to defend Notice 2017-10. See, *e.g.*, *Green Valley Invs., LLC v. Comm’r*, 159 T.C. 80 (2022) and *Green Rock, LLC v. IRS*, 654 F.Supp.3d 1249 (N.D. Ala. 2023), *aff’d*, 104 F.4th 220 (11th Cir. 2024).

38 IRS response to TAS information request (Oct. 25, 2024); IRS, CDW, IMF Transaction History table, and the Examination Operational Automation Database (Nov. 2024).

### Passive Activities (Schedule E) Income and Expenses

We identified three cases where passive activity income and expenses reported on Schedule E were at issue before the Tax Court. Schedule E (Form 1040) is used to report income or loss from rental real estate, royalties, partnerships, S corporations, estates, trusts, and residual interests in Real Estate Mortgage Investment Conduits. Like business activities reported on Schedule C, taxpayers must keep records to support items reported on Schedule E, and unsubstantiated deductions can be the reason underlying the statutory notice of deficiency. Passive activities were the subject of a statutory notice of deficiency in 802 petitions during FY 2024.<sup>39</sup>

### Foreign Earned Income Exclusion (IRC § 911)

We identified two cases in the individual category where exclusion of income under IRC § 911 was at issue. IRC § 911(a)(1) allows a qualified individual to elect to exclude from gross income the individual's foreign earned income. IRC § 911(d)(1) defines the term "qualified individual" as an individual whose tax home is in a foreign country and who is (a) a citizen of the United States and establishes to the satisfaction of the Secretary of the Treasury that the individual has been a *bona fide* resident of a foreign country or countries for an uninterrupted period that includes an entire taxable year, or (b) a citizen or resident of the United States who, during any period of 12 consecutive months, is present in a foreign country or countries during at least 330 full days. The FEIE category did not make our top ten list for petitions during FY 2024.<sup>40</sup>

### Deadline for Filing a Petition in Tax Court (IRC §§ 6213(a), 6015(e))

We identified seven cases in the individual category where the deadline for filing a petition in Tax Court was at issue. A taxpayer must file a petition with the Tax Court within 90 days of the date the statutory notice of deficiency was mailed (or 150 days if the statutory notice of deficiency is addressed to a person outside the United States). If the last day of the 90 days (or 150 days) falls on a Saturday, Sunday, or legal holiday, the petition will be timely if filed on the next day that is not a Saturday, Sunday, or legal holiday.<sup>41</sup> In one case, the filing location was inaccessible on the date a petition was due because of an administrative closure, and the period for filing a petition was tolled for the number of days within the period of inaccessibility plus 14 days, pursuant to IRC § 7451(b).<sup>42</sup> In another case, the IRS mailed a statutory notice of deficiency that incorrectly stated a longer deadline for the petition deadline but mailed a corrected statutory notice of deficiency the next day. The Court held the taxpayer's petition was timely because it was filed before the incorrectly stated deadline in the first statutory notice of deficiency.<sup>43</sup>

### Limitation on Assessment Period IRC § 6501

We identified two cases in the individual category where the limitation period on assessment in IRC § 6501 was at issue. Generally, an assessment of tax must be made within three years from the received date of an original tax return or three years from the due date of the original return, whichever is later. The IRS cannot assess tax after the limitation period for assessment has expired.<sup>44</sup>

39 IRS response to TAS information request (Oct. 25, 2024). TAS matched this data to information from CDW, IMF Transaction History table for FY 2024, and the Examination Operational Automation Database (Nov. 2024).

40 *Id.*

41 IRC § 6213(a).

42 *Sall v. Comm'r*, 161 T.C. No. 13 (Nov. 30, 2023).

43 *Dodson v. Comm'r*, 162 T.C. No. 1 (Jan. 3, 2024).

44 IRC § 6501(a).



### Ten Percent Additional Tax on Early Distributions From Qualified Retirement Plans (IRC § 72(t))

IRC § 72(t)(1) imposes a ten percent additional tax on any amount a taxpayer receives from a qualified retirement plan (as defined in IRC § 4974(c)), unless the distribution qualifies for one of the exceptions provided in IRC § 72(t)(2), such as distributions made on or after the date on which the employee attains age 59½, made to a beneficiary (or to the estate of the employee) on or after the death of the employee, or attributable to the employee being disabled.<sup>45</sup> In two opinions during FY 2024, taxpayers challenged their liability for the ten percent additional tax.

### Filing Status and Dependents

This category includes personal exemptions for individual taxpayers and spouses, dependent children, and other dependents, along with filing status. This category did not make the top ten list in our analysis of Tax Court opinions but ranked third on individual taxpayer issues petitioned to the Tax Court with 1,537 petitions.<sup>46</sup>

### Family Status Related Credits and the Earned Income Tax Credit

The family status related credits category includes the Child Tax Credit (CTC), Additional Child Tax Credit, Child and Dependent Care Credit, and the Adoption Credit. This category did not make the top ten list in our analysis of Tax Court opinions but ranked fourth on individual taxpayer issues petitioned to the Tax Court with 1,247 petitions. The EITC, in its own category, ranked sixth place on individual taxpayer issues petitioned to the Tax Court with 1,181 petitions from individual taxpayers in FY 2024.<sup>47</sup>

### Payments and Other Credits

This category includes taxes on qualified retirement plans, including individual retirement accounts, Social Security and Medicare tax on tip income, and various credits such as the Retirement Savings Contribution Credit under IRC § 25B, mortgage interest credit under IRC § 25, and credits and carryforwards from alternative minimum tax under IRC § 55.<sup>48</sup> During FY 2024, 694 petitions included these types of issues in the business category, making it the fourth most litigated issue for business taxpayers. It ranked fifth in the individual category, with 1,207 petitions.<sup>49</sup>

### Microcaptive Insurance Agreement (IRC § 831(b))

We identified three cases in the business category involving microcaptive insurance agreements. IRC § 831(b) provides an alternative taxing structure for certain small non-life insurance companies to pay tax only on their investment income and not on their earned premiums. In 2023, the Department of Treasury and the IRS proposed regulations identifying certain microcaptive transactions as abusive tax transactions.<sup>50</sup> Cases in this category typically involve an IRS challenge to whether the captive insurance arrangement meets the definition of insurance.

45 IRC § 72(t)(2)(A)-(N) provides circumstances where taxpayers can make early distributions without incurring additional tax. Subparagraph N is scheduled to go into effect for distributions made after Dec. 29, 2025. Pub. L. No. 117-328, Div. T, Title III, § 334(c), (e), 136 Stat. 4459, 5370, 5372 (2022).

46 IRS response to TAS information request (Oct. 25, 2024). TAS matched this data to information from CDW, IMF Transaction History table for FY 2024, and the Examination Operational Automation Database (Nov. 2024).

47 *Id.*

48 The Tax Cuts and Jobs Act suspended these exemptions through 2025. See IRC § 151(d)(5).

49 IRS response to TAS information request (Oct. 25, 2024). TAS matched this data to information from CDW, IMF Transaction History table for FY 2024, and the Examination Operational Automation Database (Nov. 2024).

50 Micro-Captive Listed Transactions and Micro-Captive Transactions of Interest, 88 Fed. Reg. 21,547, 21,549 (proposed Apr. 11, 2023) (to be codified at Treas. Reg. § 1.6011-4(b)(6)), <https://www.govinfo.gov/content/pkg/FR-2023-04-11/pdf/2023-07315.pdf>.

## OTHER ISSUES

This year, we tracked the issues litigated in the Tax Court and other federal courts separately. Outside of the top ten issues framework, we also tracked other issues litigated in the Tax Court.

### Accuracy-Related Penalty (IRC § 6662)

We identified 24 total opinions issued by the Tax Court for individual and business taxpayers during the reporting period where taxpayers litigated the accuracy-related penalty. In FY 2024, 172 business and 1,038 individual taxpayers petitioned the Tax Court where the accuracy-related penalty was an issue.<sup>51</sup>

### Fraud Penalty (IRC § 6663)

We identified three individual and five business cases issued during the reporting period where the fraud penalty under IRC § 6663 was at issue. If an underpayment of tax required to be shown on a return is due to fraud, an addition to tax equal to 75 percent of the underpayment shall be added. The fraud penalty was the subject of a statutory notice of deficiency in 50 petitions during FY 2024 for individuals and ten petitions for businesses.<sup>52</sup>

### Supervisory Preassessment Penalty Approval Under IRC § 6751(b)(1)<sup>53</sup>

We identified six opinions in the Tax Court that ruled on supervisory preassessment penalty approval under IRC § 6751(b)(1). IRC § 6751(b)(1) provides: “No penalty under this title shall be assessed unless the initial determination of such assessment is personally approved (in writing) by the immediate supervisor of the individual making such determination or such higher-level official as the Secretary may designate.” IRC § 6751(b)(2) carves out two categories of exceptions from this supervisory approval requirement: (i) the additions to tax for failure to file a tax return or pay the tax due (IRC § 6651), the additions to tax for failure to pay sufficient estimated tax (IRC §§ 6654 and 6655), and the accuracy-related penalty (IRC § 6662(b)(9)-(10)); and (ii) any other penalty that is “automatically calculated through electronic means.” IRC § 6751(b) protects the taxpayer’s *right to a fair and just tax system* by ensuring the IRS imposes penalties only in appropriate circumstances and does not use them as a bargaining chip to encourage settlement.<sup>54</sup> However, the phrase “initial determination of [an] assessment” is unclear. A “determination” is made based on the IRS’s investigation of the taxpayer’s liability and an application of the penalty statutes. An “assessment” is merely the entry of a decision on IRS records. Therefore, while a penalty can be determined and a penalty can be assessed, “one cannot ‘determine’ an assessment.”<sup>55</sup> Due to this ambiguity in the statute, an increasing number of courts have had to grapple with this issue when written supervisory approval must be provided.<sup>56</sup> Thus, we continue to see litigation on this issue.<sup>57</sup>

51 IRS response to TAS information request (Nov. 11, 2024); IRS, CDW, IMF Transaction History table, and the Examination Operational Automation Database (Nov. 2024).

52 IRS response to TAS information request (Oct. 25, 2024). TAS matched this data to information from CDW, IMF Transaction History table for FY 2024, and the Examination Operational Automation Database (Nov. 2024).

53 For a more in-depth discussion, see Most Serious Problem: *Civil Penalty Administration: The IRS’s Administration of Penalties Is Often Unfair, Is Inconsistently Detering Improper Behavior, Is Not Promoting Efficient Administration, and Thus Is Discouraging Tax Compliance*, *supra*.

54 See S. REP. No. 105-174, at 65 (1998).

55 *Chai v. Comm’r*, 851 F.3d 190, 218-19 (2d Cir. 2017) (quoting *Graev v. Comm’r*, 147 T.C. 460 (2016) (Gustafson, J., dissenting)).

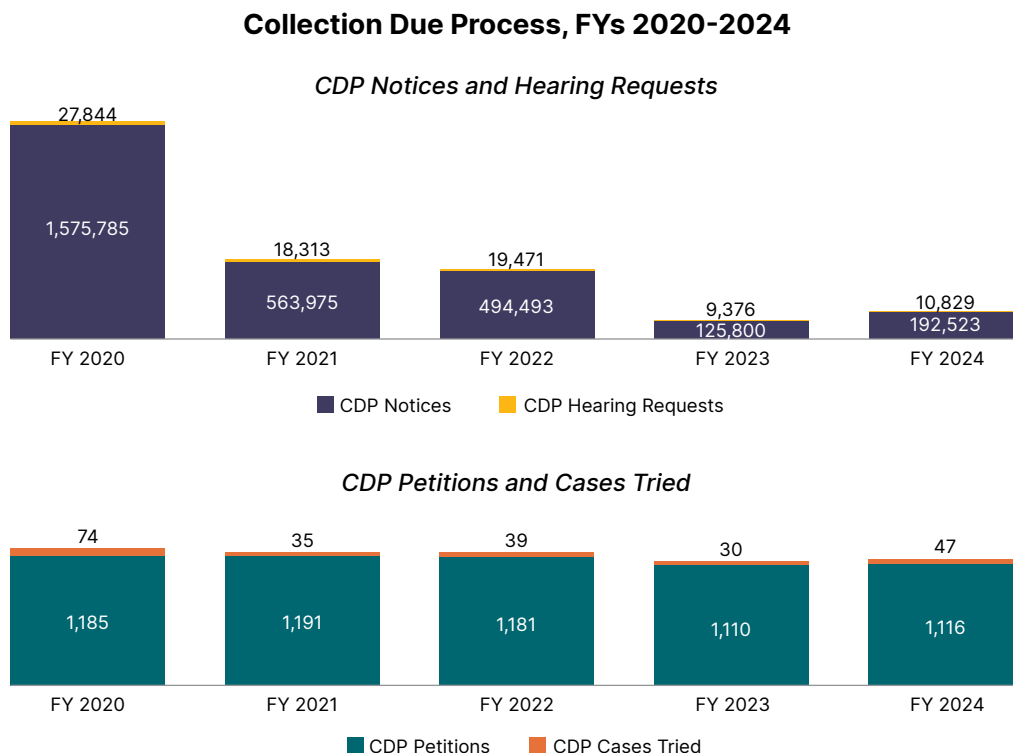
56 See National Taxpayer Advocate 2019 Annual Report to Congress 149 (Most Litigated Issue: *Accuracy-Related Penalty Under IRC § 6662(b)(1) and (2)*), [https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/ARC19\\_Volume1\\_MLI\\_03\\_Accuracy.pdf](https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/ARC19_Volume1_MLI_03_Accuracy.pdf); National Taxpayer Advocate 2018 Annual Report to Congress 447 (Most Litigated Issue: *Accuracy-Related Penalty Under IRC § 6662(b)(1) and (2)*), [https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/07/ARC18\\_Volume1\\_MLI\\_01\\_AccuracyRelatedPenalty.pdf](https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/07/ARC18_Volume1_MLI_01_AccuracyRelatedPenalty.pdf).

57 For a legislative recommendation on this topic, see National Taxpayer Advocate 2025 Purple Book, *Compilation of Legislative Recommendations to Strengthen Taxpayer Rights and Improve Tax Administration (Clarify That Supervisory Approval Is Required Under IRC § 6751(b) Before Proposing Penalties)*.

### Collection Due Process Hearings (IRC §§ 6320 and 6330)<sup>58</sup>

Our review of litigated issues found 29 substantive opinions issued on Collection Due Process (CDP) cases litigated in the Tax Court. Each year, only a small fraction of taxpayers exercise their right to request an administrative hearing or petition for judicial review. Figure 3.5 depicts the filing trends for CDP cases over the last five years.

**FIGURE 3.5<sup>59</sup>**



Based on data we received from the IRS Office of Chief Counsel (Chief Counsel), for FY 2024, there were 47 cases tried in all federal courts relating to CDP issues.<sup>60</sup> We recorded a slight increase in CDP petitions, with 1,116 in FY 2024, up slightly from 1,110 petitions in FY 2023. *Pro se* taxpayers continue to make up a majority of the total cases in FY 2024, with 832 (75 percent) of 1,116 cases having unrepresented taxpayers compared to 284 (25 percent) of represented taxpayers.<sup>61</sup>

In FY 2024, the IRS issued 192,523 CDP notices to taxpayers (135,324 individual and 57,199 business), a sharp increase from the 125,800 notices issued to individual taxpayers in FY 2023, due to the return to normal collection activities. In FY 2024, 10,829 taxpayers requested CDP hearings (6,170 individuals and 4,659 businesses), up from 9,376 requested in FY 2023.<sup>62</sup> CDP hearings continue to play a vital role in overall

<sup>58</sup> Due to the unique nature of CDP, we discuss it separately.

<sup>59</sup> IRS, Counsel Automated Tracking System; IRS, CDW, IMF Transaction History table (FYs 2020-2024). Please note that the IRS posts some CDP transactions to the Master File after the close of the FY. TAS continues to report the CDW data the IRS posted to its CDW at the end of the fiscal year.

<sup>60</sup> The IRS Office of Chief Counsel compiled the total number of CDP cases tried (Nov. 12, 2024).

<sup>61</sup> The IRS Office of Chief Counsel compiled the total number of CDP petitions to the Tax Court (Nov. 12, 2024). IRS, Counsel Automated Tracking System, Subtype DU. Inventory pending as of September 30, 2024. This does not include cases on appeal.

<sup>62</sup> IRS, CDW, IMF (FYs 2020-2024); IRS, CDW, Business Master File (FYs 2020-2024). Please note that the IRS posts some CDP transactions to the Master File after the close of the FY. TAS continues to report the CDW data the IRS posted to its CDW at the end of the fiscal year.

tax administration by allowing taxpayers to contest a lien or levy before (or soon after) the IRS takes the collection action, especially after the IRS restarted its collection actions after the end of the pandemic.

## TOP ISSUES IN OTHER FEDERAL COURTS

The 174 opinions issued by the Tax Court account for less than half of the 414 total opinions we reviewed for FY 2024. The remaining 240 opinions come from other federal courts, namely U.S. district courts, U.S. Bankruptcy Courts, Courts of Appeals, Court of Federal Claims, and the U.S. Supreme Court. These opinions involved 158 individual taxpayer issues and 82 business tax issues. We list three of the four most common issues below, the opinions for which focused mainly on factual disputes:

- Civil Actions to Enforce Federal Tax Liens or to Subject Property to Payment of Tax (IRC §§ 6321 and 7403) – 27 opinions;
- Civil Actions for Refund (IRC § 7422) – 25 opinions; and
- Summons Enforcement (IRC §§ 7602(a), 7604(a), and 7609(a)) – 24 opinions.

Report of Foreign Bank and Financial Accounts (FBAR) penalties tied for the third most common issue, with 24 opinions, many of which involved statutory analysis. Ten district court opinions considered what it means for a violation of FBAR requirements to be “willful.” The Sixth and Ninth Circuits held that a willful violation of the FBAR reporting requirements can include both knowing and reckless violations, joining all other circuits to have addressed the issue.<sup>63</sup> The Eleventh Circuit held that FBAR penalties are fines subject to the Eighth Amendment’s Excessive Fines Clause, creating a split with the only other circuit to have considered the question.<sup>64</sup> The National Taxpayer Advocate’s 2025 Purple Book includes two recommendations to address unfair and complex FBAR-related requirements.<sup>65</sup>

Other issues in federal courts did not arise as frequently as those mentioned above. Some noteworthy court opinions analyzing legislation and congressional intent include:

- A district court held that the government may assert the 20 percent IRC § 6676 penalty on “excessive” refund claim amounts as a counterclaim in a refund suit without first going through notice and demand procedures in IRC § 6671 or obtaining timely approval by an IRS supervisor under IRC § 6751(b).<sup>66</sup>
- The Ninth Circuit affirmed its precedent on what qualifies as a tax return under the Bankruptcy Code, 11 U.S.C. § 523(a), for discharge purposes, reinforcing an existing circuit split on this issue.<sup>67</sup>
- The Seventh Circuit recognized that there is uncertainty regarding what legal standard the IRS must meet when seeking injunctive relief against a taxpayer under IRC § 7402(a), which is a broad

63 *United States v. Kelly*, 92 F.4th 598, 603 (6th Cir. Feb. 8, 2024); *United States v. Hughes*, 113 F.4th 1158, 1163 (9th Cir. Aug. 21, 2024).

64 *United States v. Schwarzbaum*, 114 F.4th 1319, 1334 (11th Cir. Aug. 30, 2024); see also *United States v. Toth*, 33 F.4th 1, 19 (1st Cir. 2022). See Andrew Velarde, *FBAR Penalty Circuit Split Has Potential for Supreme Court Review*, TAX NOTES, Sept. 30, 2024, at 2814, <https://www.taxnotes.com/tax-notes-today-international/penalties/fbar-penalty-circuit-split-has-potential-supreme-court-review/2024/09/24/71ml9>.

65 National Taxpayer Advocate 2025 Purple Book, *Compilation of Legislative Recommendations to Strengthen Taxpayer Rights and Improve Tax Administration (Eliminate Duplicative Reporting Requirements Imposed by the Bank Secrecy Act and the Foreign Account Tax Compliance Act) and (Modify the Definition of “Willful” for Purposes of Determining Report of Foreign Bank and Financial Accounts Violations and Reduce the Maximum Penalty Amounts)*.

66 *Townley v. United States*, No. 3:22-CV-107 (CDL), 2023 WL 7555441, at \*2 (M.D. Ga. Nov. 14, 2023). For recommendations on related issues, see National Taxpayer Advocate 2025 Purple Book, *Compilation of Legislative Recommendations to Strengthen Taxpayer Rights and Improve Tax Administration (Provide That Assessable Penalties Are Subject to Deficiency Procedures) and (Clarify That Supervisory Approval Is Required Under IRC § 6751(b) Before Proposing Penalties)*; see also Carlton M. Smith, *Government Can Counterclaim for Section 6676 Penalties in Refund Suit*, PROCEDURALLY TAXING (Jan. 16, 2024), <https://www.taxnotes.com/procedurally-taxing/government-can-counterclaim-section-6676-penalties-refund-suit/2024/01/16/7j2kr>.

67 *In re Salvador*, No. 23-60008, 2024 WL 885041 (9th Cir. Mar. 1, 2024), cert. denied, No. 24-108 (U.S. Nov. 4, 2024). See National Taxpayer Advocate 2014 Annual Report to Congress 417 (Legislative Recommendation: *Late-Filed Returns: Clarify the Bankruptcy Law Relating to Obtaining a Discharge*), [https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/2014-ARC\\_VOL-1\\_S2\\_LR-19-508.pdf](https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/2014-ARC_VOL-1_S2_LR-19-508.pdf).

provision that allows district courts to issue injunctions and other similar relief when “necessary or appropriate for the enforcement of the internal revenue laws.”<sup>68</sup>

- The Eleventh Circuit held that Congress did not intend to exempt the IRS’s designation of reportable and listed transactions under IRC § 6707A from the notice-and-comment procedures of the Administrative Procedure Act.<sup>69</sup>
- In what the Ninth Circuit described as an “unfortunate case with a potentially unjust outcome,” taxpayers who timely filed a refund claim were denied the roughly \$700,000 refund they would have otherwise qualified for because of a timing limitation known as the “lookback” period.<sup>70</sup> Although it would not have applied to change the outcome in this case, the National Taxpayer Advocate recommends a change to the lookback period provision that would reduce the extent to which the rule creates an unexpected trap for taxpayers.<sup>71</sup>
- The Ninth Circuit analyzed how the 24-month deemed acceptance period in IRC § 7122(f) operates when an offer in compromise is submitted during a CDP hearing, holding that the period terminated when the Collection Division initially returned the offer, not when Appeals issued a notice of determination. Each of the three judges on the panel wrote an opinion expressing a different understanding of the statutory scheme, through a majority opinion, concurrence, and dissent.<sup>72</sup>

### Civil Actions to Enforce Federal Tax Liens or to Subject Property to Payment of Tax (IRC §§ 6321 and 7403)

During FY 2024, we identified 27 opinions involving civil actions to enforce liens under IRC §§ 6321 and 7403. This is a significant decrease from the 44 opinions reported last year but higher than the 19 opinions reported in FY 2022.<sup>73</sup>

### Summons Enforcement (IRC §§ 7602(a), 7604(a), and 7609(a))

In FY 2024, there were 29 summons enforcement cases, which Chief Counsel referred to the Department of Justice (DOJ) Tax Division.<sup>74</sup> Nineteen proceedings were brought against the United States to quash or enjoin an IRS summons, and ten proceedings were brought by the United States to enforce a summons.

68 *United States v. Olson*, 98 F.4th 840, 842 (7th Cir. Apr. 11, 2024) (*per curiam*). See also Leslie Book, *Seventh Circuit Flushes District Court in Olson Injunction Battle*, PROCEDURALLY TAXING (Apr. 19, 2024), <https://www.taxnotes.com/procedurally-taxing/seventh-circuit-flushes-district-court-olson-injunction-battle/2024/04/19/7jff7>.

69 *Green Rock LLC v. IRS*, 104 F.4th 220, 229 (11th Cir. June 4, 2024). For a discussion of prior cases challenging IRS guidance under the Administrative Procedure Act, see National Taxpayer Advocate 2023 Annual Report to Congress 176 (Most Litigated Issues: *Litigation Trend: Challenges Concerning the Administrative Procedure Act*), [https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2024/02/ARC23\\_MostLitigatedIssues.pdf](https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2024/02/ARC23_MostLitigatedIssues.pdf).

70 *Libitzky v. United States*, 110 F.4th 1166, 1176 (9th Cir. Aug. 5, 2024).

71 National Taxpayer Advocate 2025 Purple Book, *Compilation of Legislative Recommendations to Strengthen Taxpayer Rights and Improve Tax Administration (Amend the Lookback Period for Allowing Tax Credits or Refunds to Include the Period of Any Postponement or Additional or Disregarded Time for Timely Filing a Tax Return)*; see also Leslie Book, *Don't Look Back in Anger: Refund Limits Put Kibosh on Large Claim*, PROCEDURALLY TAXING (Aug. 21, 2024), <https://www.taxnotes.com/procedurally-taxing/dont-look-back-anger-refund-limits-put-kibosh-large-claim/2024/08/21/714v3>.

72 *Brown v. Comm'r*, 116 F.4th 861 (9th Cir. Aug. 29, 2024). See also Keith Fogg, *Deemed Offer Acceptance, Part 1*, PROCEDURALLY TAXING (Sept. 13, 2024), <https://www.taxnotes.com/procedurally-taxing/deemed-offer-acceptance-part-1/2024/09/13/7169b>; Keith Fogg, *Deemed Offer Acceptance, Part 2*, PROCEDURALLY TAXING (Sept. 16, 2024), <https://www.taxnotes.com/procedurally-taxing/deemed-offer-acceptance-part-2/2024/09/16/716gt>.

73 National Taxpayer Advocate 2023 Annual Report to Congress 154 (Most Litigated Issues), [https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2024/02/ARC23\\_MostLitigatedIssues.pdf](https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2024/02/ARC23_MostLitigatedIssues.pdf).

74 Data provided by the DOJ to Chief Counsel (Nov. 4, 2024). The Tax Division generally only has a record of summons enforcement cases if Chief Counsel refers the matter to the Tax Division. Under the Justice Manual, the vast majority of summons enforcement cases are referred directly to U.S. Attorney Offices, and the Tax Division does not have a record of those matters. Similarly, the DOJ generally only tracks proceedings to quash a summons filed with taxpayers or third parties if the DOJ Tax Division's attorneys will be appearing in the case. Thus, the information does not reflect the total number of summons enforcement cases filed in FY 2024; rather, it reflects only those for which the DOJ Tax Division opened a matter.

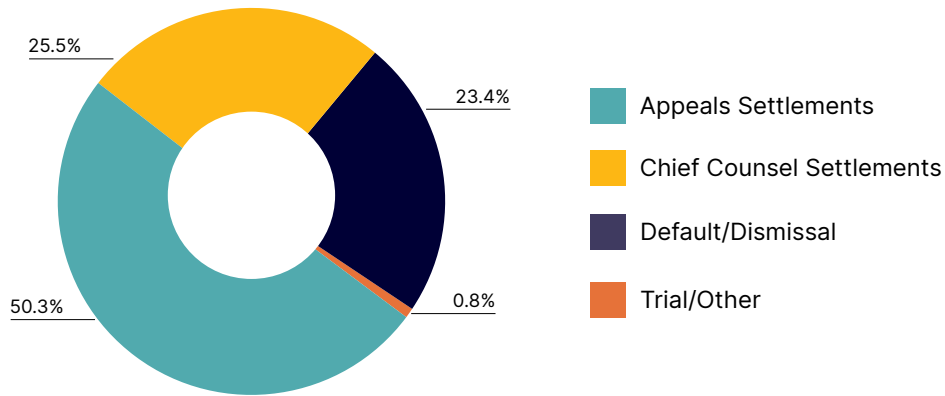
### SETTLEMENTS OF CASES PETITIONED TO THE TAX COURT

Most cases filed by taxpayers in the Tax Court are resolved without a trial. After a taxpayer files a petition, Chief Counsel files an answer. Chief Counsel then generally refers the case to Appeals for settlement consideration. If the taxpayer and Appeals do not resolve the case, the case returns to Chief Counsel, which may also settle the case.

During FY 2024, 17,659 Tax Court cases were settled – 11,720 by Appeals and 5,939 by Chief Counsel. As shown in Figure 3.6, around three-fourths of the cases were settled, with about 50 percent settled by Appeals and about 25 percent settled by Chief Counsel.<sup>75</sup>

**FIGURE 3.6<sup>76</sup>**

**Outcomes of Tax Court Petitions, FY 2024**



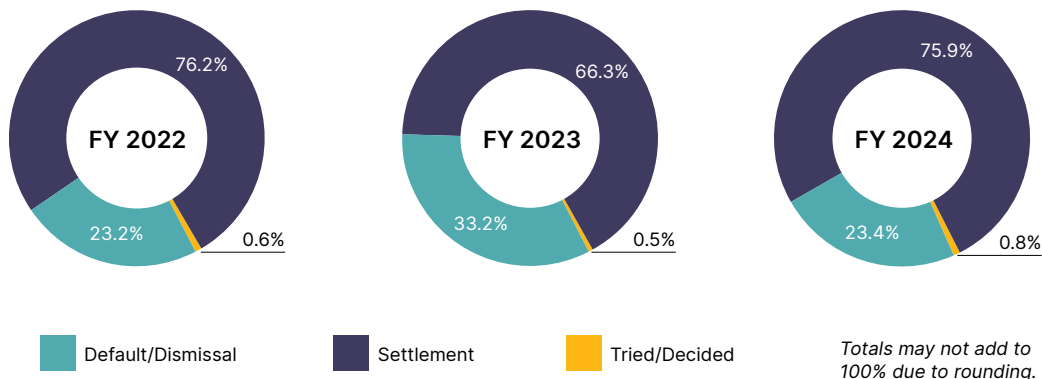
The vast majority of cases petitioned to the Tax Court are settled by agreement between the parties. Figure 3.7 illustrates the cases dismissed, settled, and tried in Tax Court during the last three fiscal years. In FY 2024, 75.8 percent of the Tax Court cases were closed by settlement, while 23.4 percent were dismissed or defaulted, and only 0.8 percent were tried.

<sup>75</sup> Data compiled by IRS Office of Chief Counsel (Nov. 14, 2024); IRS, Counsel Automated Tracking System, TL-708D, TL-709. Inventory pending as of Sept. 30, 2024. Does not include cases on appeal or declaratory judgments.

<sup>76</sup> Data compiled by IRS Office of Chief Counsel (Nov. 14, 2024); IRS, Counsel Automated Tracking System, TL-708D, TL-709. Inventory pending as of Sept. 30, 2024. Does not include cases on appeal or declaratory judgments.

FIGURE 3.7<sup>77</sup>

Cases Dismissed, Settled, and Tried in Tax Court, FYs 2022-2024



Settlements are vital to the tax litigation process and save all parties the time and expense of a trial. To provide settlement opportunities, Chief Counsel continued to coordinate with Low Income Taxpayer Clinics (LITCs),<sup>78</sup> American Bar Association volunteer attorneys, and other *pro bono* organizations to offer “Settlement Days” in FY 2024. Chief Counsel held 19 events, of which 17 were virtual and two were in person. Through Settlement Days, Chief Counsel held 202 meetings and settled 133 cases, resulting in a settlement rate of almost 66 percent in FY 2024.<sup>79</sup> Taxpayers whose cases were not settled still benefited because they had the opportunity to obtain free legal advice from volunteer attorneys or LITCs and were in a better position to understand their cases and the Tax Court process.

ANALYSIS OF PRO SE LITIGATION

When a taxpayer appears before the court without a representative, they appear *pro se*.<sup>80</sup> In FY 2024, about 89 percent of cases petitioned to the Tax Court involved *pro se* taxpayers and about 11 percent of cases involved taxpayers who were represented, as shown in Figure 3.8.

FIGURE 3.8<sup>81</sup>



77 Data compiled by Chief Counsel (Nov. 14, 2024); IRS, Counsel Automated Tracking System, TL-711. Inventory pending as of Sept. 30, 2024. Does not include cases on appeal or declaratory judgments.  
 78 See IRC § 7526.  
 79 Data compiled by Chief Counsel (Nov. 11, 2024).  
 80 “Pro se” means “for himself; in his own behalf; in person.” BLACK’S LAW DICTIONARY (2nd ed.), <https://thelawdictionary.org/pro-se/> (last visited Nov. 20, 2024).  
 81 Data compiled by Chief Counsel (Oct. 7, 2024); Counsel Automated Tracking System, TL-708A. Does not include cases on appeal and declaratory judgments.

Over the past ten years, an average of about 85 percent of taxpayers appearing in Tax Court were not represented by counsel.<sup>82</sup> Self-represented taxpayers are disadvantaged in tax litigation as they are unfamiliar with the Tax Court's Rules of Practice and Procedure, Federal Rules of Evidence, and the nuances of negotiating with the IRS. The dollar amounts 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. Even if a taxpayer has the means to do so, the amount at issue may not justify the cost.

### Tax Court Petition Generator

In FY 2024, the Tax Court launched a petition generator. By answering questions as prompted, the taxpayer provides the information necessary for Docket Access Within A Secure Online Network (DAWSON) to generate a completed petition that is ready to e-file.<sup>83</sup> This feature allows *pro se* taxpayers to file a case quickly and easily with the Tax Court without having to download or upload petition forms.<sup>84</sup>

### Impact of Low Income Taxpayer Clinics on Tax Court Litigation

To provide more support to unrepresented petitioners, Congress enacted IRC § 7526 in 1998 to provide grants of up to \$100,000 per year (\$200,000 for FY 2024) for eligible LITCs.<sup>85</sup> The Tax Court administers the tax clinics and the Bar-Sponsored Calendar Call programs that provide advice and assistance to many low-income, self-represented taxpayers.<sup>86</sup> The tax clinics and Bar-Sponsored Calendar Call Program enable eligible taxpayers to receive free legal advice and representation at a trial session.

Each year, LITCs provide crucial assistance to low-income taxpayers in Tax Court cases. For the taxpayers they help, paying for legal representation is not an option, and the LITCs' free assistance levels the playing field. The Tax Court can be an intimidating place, especially with complicated tax laws and facts difficult to convey or substantiate. Without representation, many taxpayers abandon their right to challenge a tax liability in court. However, with the assistance of LITC attorneys, students, and volunteers, taxpayers can exercise their rights and are afforded the opportunity to reach a fair and just outcome. LITCs provide access to justice and assistance that help low-income taxpayers obtain much-needed refunds and protect their *right to pay no more than the correct amount of tax*.<sup>87</sup>

During 2023, 125 LITCs participated in the Tax Court Clinical Program. LITC practitioners litigated 1,879 cases in the Tax Court and 39 cases in other federal courts on behalf of low-income taxpayers. LITC practitioners assisted taxpayers in many cases without litigation, entering appearances in 1,209 cases, representing taxpayers in 698 cases that did not require an entry of appearance, and providing informal advice through consultation at the Tax Court in 518 cases.<sup>88</sup> In addition to the services they provide through direct assistance, LITCs help court proceedings run more smoothly, reduce litigation, and ease the administrative burden on the courts.

82 Data compiled by Chief Counsel (Oct. 7, 2024); Counsel Automated Tracking System, TL-708A. Note that non-attorneys may be admitted to practice before the Tax Court provided they satisfy the requirements in the Tax Court Rules of Practice and Procedure, including passing a written examination.

83 See U.S. Tax Court, DAWSON Release Notes, [https://ustaxcourt.gov/release\\_notes.html](https://ustaxcourt.gov/release_notes.html) (last visited Nov. 20, 2024).

84 In September 2024, the Tax Court began allowing practitioners to use the petition generator. See U.S. Tax Court, DAWSON Release Notes, [https://ustaxcourt.gov/release\\_notes.html](https://ustaxcourt.gov/release_notes.html) (last visited Nov. 20, 2024).

85 IRS, Pub. 3319, Low Income Taxpayer Clinics 2025 Grant Application Package and Guidelines (Apr. 2024), <https://www.irs.gov/pub/irs-pdf/p3319.pdf>. TAS administers and oversees the grant program through its LITC Program Office. To provide more support to unrepresented petitioners, Congress enacted IRC § 7526 in 1998 to provide grants of up to \$100,000 per year for eligible LITCs. However, in the Consolidated Appropriations Act, 2023 and 2024, Congress increased the grant of up to \$200,000 per year for eligible LITCs, that language is included in the 2025 House and Senate appropriation bills.

86 See U.S. Tax Court, Clinics & Pro Bono Programs, <https://www.ustaxcourt.gov/clinics.html> (last visited Nov. 20, 2024). The Tax Court continues to invite academic and non-academic tax clinics and bar-sponsored programs to consider participating and representing *pro se* taxpayers.

87 See IRC § 7803(a)(3)(C).

88 Email from TAS LITC Program Office (Oct. 27, 2024) (on file with TAS).



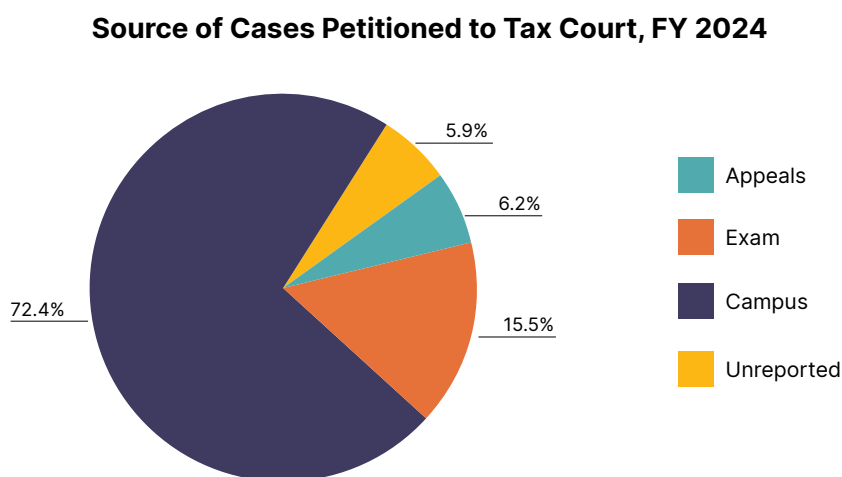
Considering the increase in the number of LITCs since the enactment of IRC § 7526 and that the \$100,000 limit<sup>89</sup> on grant funding was not indexed for inflation, TAS recommends changes to the LITC program that would provide for even more taxpayers to receive assistance in resolving their controversies with the IRS.<sup>90</sup>

### SOURCES OF CASES PETITIONED TO THE TAX COURT

Depending on the taxpayer’s actions after receiving a notice from the IRS, an IRS Service Center (Campus), Field Exam, or Appeals may issue a statutory notice of deficiency. The statutory notice of deficiency is the ticket-to-Tax Court and the document that starts the procedural clock for timely filing a petition. In a CDP case, taxpayers file a petition based upon a notice of determination from a CDP hearing. The notice of determination, like the statutory notice of deficiency, starts the period in which a taxpayer must file a petition with the Tax Court.<sup>91</sup>

Figure 3.9 shows statutory notice of deficiency filings based on the IRS function that issued the notice attached to each petition.

**FIGURE 3.9<sup>92</sup>**



89 For FY 2024, additional funding allowed LITCs to receive grants of up to \$200,000. IRS, Pub. 3319, Low Income Taxpayer Clinics 2025 Grant Application Package and Guidelines (Apr. 2024), <https://www.irs.gov/pub/irs-pdf/p3319.pdf>.

90 National Taxpayer Advocate 2025 Purple Book, *Compilation of Legislative Recommendations to Strengthen Taxpayer Rights and Improve Tax Administration (Enable the Low Income Taxpayer Clinic Program to Assist More Taxpayers in Controversies With the IRS)*.

91 If a taxpayer receives a statutory notice of deficiency and wishes to have the Tax Court hear the case, they must file a petition with the Tax Court within 90 days of the date the IRS mailed the statutory notice of deficiency (or 150 days if the statutory notice of deficiency is addressed to a person outside the United States). See IRC § 6213. Note that if the last day of the 90 days (or 150 days) falls on a Saturday, Sunday, or legal holiday, the petition will be timely if filed on the next day that is not a Saturday, Sunday, or legal holiday. See IRC § 7503. See also IRC §§ 6320 and 6330 for the timeframes in which to petition the Tax Court for review of a CDP notice of determination.

92 Data compiled by Chief Counsel (Nov. 11, 2024); 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. Appeals and Chief Counsel provided the petition data. Data from Counsel included cumulative data on litigation in all jurisdictions of the United States. Data from Appeals only included data from petitions filed with the Tax Court.

From FY 2023 to FY 2024, statutory notice of deficiency filings arising from Campus cases and unreported cases declined. There was a slight increase in cases arising from Exam, while cases from Appeals stayed the same. Petitions from statutory notices of deficiency arising from Campus cases saw the largest real decrease, with about 800 fewer petitions compared to last year. However, Campus cases remain the most significant source of statutory notices of deficiency filed, consistent with the trend over the past decade.<sup>93</sup>

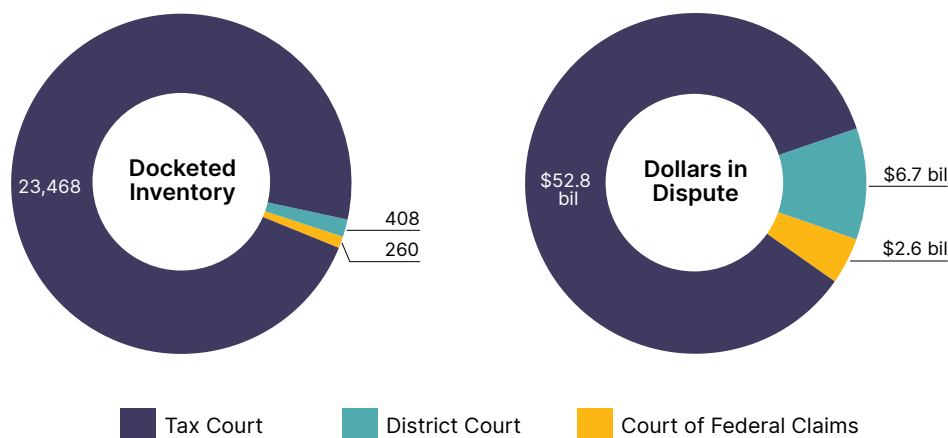
When a Campus issues a statutory notice of deficiency, it is highly likely that the taxpayer has not even spoken with an IRS employee. Even for taxpayers who seek interaction at the Exam or Appeals level, some have had difficulty reaching an IRS employee who could assist. Many faced delays when communicating with the IRS, and others encountered Appeals Officers who were more inclined to defend the IRS’s position than to impartially assess the hazards of litigation.<sup>94</sup> Many of those taxpayers missed an opportunity for achieving a resolution at the administrative level before seeking Tax Court review.

### COMPARATIVE ANALYSIS

Comparing the number of docketed cases amongst the courts in which taxpayers may litigate federal tax disputes (*i.e.*, petitions filed), the Tax Court saw the vast majority of cases in FY 2024.<sup>95</sup> Figure 3.10 shows the FY 2024 number of docketed cases in inventory and the dollar value of those cases in the Tax Court, district court, and Court of Federal Claims.

**FIGURE 3.10**<sup>96</sup>

**Docketed Inventory and Dollars in Dispute in Tax Court, District Court, and Court of Federal Claims, FY 2024**



93 Data compiled by Chief Counsel (Nov. 11, 2024); IRS, Counsel Automated Tracking System, TL-708B; National Taxpayer Advocate 2023 Annual Report to Congress 161 (Most Litigated Issues: *Sources of Cases Petitioned to the Tax Court*), [https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2024/02/ARC23\\_MostLitigatedIssues.pdf](https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2024/02/ARC23_MostLitigatedIssues.pdf). This includes declaratory judgments. The unreported category includes cases where no statutory notice was attached to the petition.

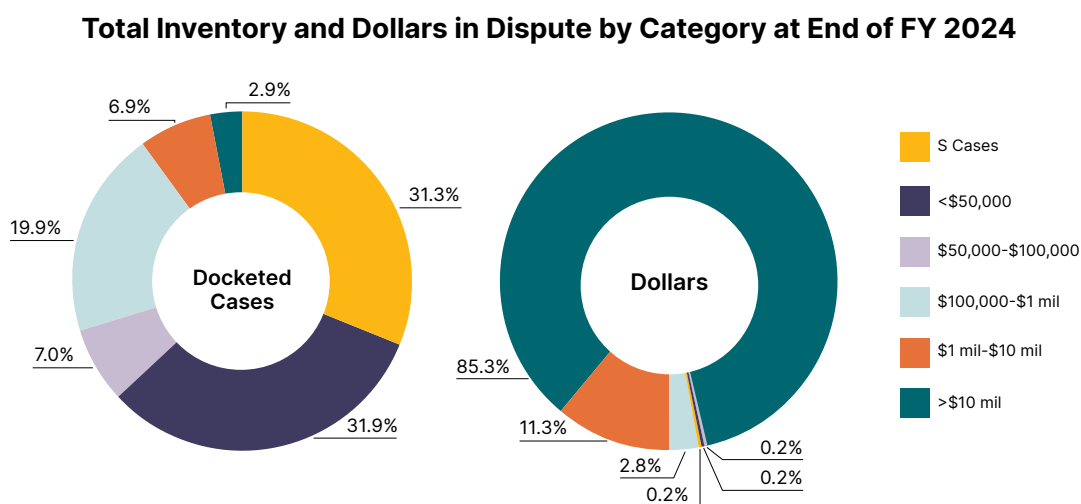
94 See National Taxpayer Advocate 2023 Annual Report to Congress (Most Serious Problem: *Appeals: Despite Some Improvements, Many Taxpayers and Tax Professionals Continue to Perceive the IRS Independent Office of Appeals as Insufficiently Independent*), [https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2024/01/ARC23\\_MSP\\_10\\_Appeals.pdf](https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2024/01/ARC23_MSP_10_Appeals.pdf).

95 Data compiled by Chief Counsel (Nov. 11, 2024); IRS, Counsel Automated Tracking System, TL-708B.

96 *Id.*

While the Tax Court docket has the overwhelming majority of cases, historically, more money is at stake on average in tax litigation in the district courts and the Court of Federal Claims. However, amounts at stake in the Tax Court rose sharply in FYs 2022-2024, roughly doubling the average in the prior eight years.<sup>97</sup> Figure 3.11 shows the total dollars in dispute for the docketed case inventory in these courts in FY 2024.

**FIGURE 3.11<sup>98</sup>**



Looking to the pending inventory of Tax Court cases at the end of FY 2024, in about 63 percent of the cases there was less than \$50,000 at stake.<sup>99</sup> About three percent of the total docketed Tax Court cases represented over 85 percent of all dollars in dispute in the Tax Court.<sup>100</sup>

Tax Court cases begin with a taxpayer filing a petition to the Court.<sup>101</sup> However, in a U.S. district court, both taxpayers and the IRS or the DOJ representing the United States can initiate proceedings as part of enforcement actions.

The DOJ, on behalf of the United States, files suit for the IRS including summons enforcement actions to produce books, papers, records, or other data or to give testimony as required by the summons.<sup>102</sup> The DOJ may bring a civil action to enforce a federal tax lien and foreclose on taxpayer property, including a personal residence, to satisfy an outstanding tax liability.<sup>103</sup> If the lien is valid, the court will typically issue an order of

97 Data compiled by Chief Counsel (Nov. 11, 2024); IRS, Counsel Automated Tracking System, TL-708B; National Taxpayer Advocate 2023 Annual Report to Congress 162 (Most Litigated Issues: *Comparative Analysis*), [https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2024/02/ARC23\\_MostLitigatedIssues.pdf](https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2024/02/ARC23_MostLitigatedIssues.pdf).

98 Data compiled by Chief Counsel (Nov. 11, 2024); IRS, Counsel Automated Tracking System, TL-708B. These dollar amounts may vary from year to year due to the individual nature of taxpayer claims, and they do not exclude amounts at issue in lawsuits ultimately determined to be frivolous. Does not include cases on appeal and declaratory judgments.

99 Data compiled by Chief Counsel (Nov. 11, 2024). Disputes involving \$50,000 or less can be selected for special, less formal proceedings under IRC § 7463. These are referred to as “small tax” or “S” cases. The Tax Court’s decision in a small tax case is nonreviewable and becomes final 90 days from the date the court enters the decision. The Tax Court may remove the S case designation on its own motion or on the motion of any party in the case at any time before the commencement of trial. See T.C. R. 171, [https://www.ustaxcourt.gov/resources/ropp/Rule-171\\_Amended\\_03202023.pdf](https://www.ustaxcourt.gov/resources/ropp/Rule-171_Amended_03202023.pdf).

100 Data compiled by Chief Counsel (Nov. 11, 2024).

101 See, e.g., IRC § 6213 (with respect to deficiency proceedings).

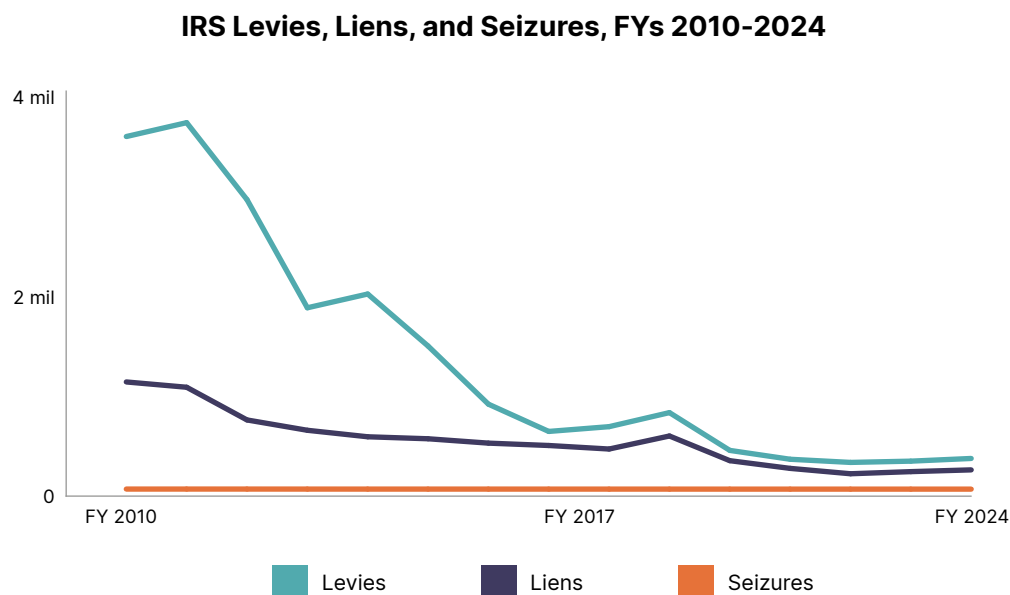
102 IRC § 7604(b) (providing that if any taxpayer or third party is summoned to appear, testify, or produce records, the U.S. district court for the district in which the taxpayer resides or is found has jurisdiction to compel the taxpayer or third party to appear, testify, or produce the records).

103 IRC § 7403.

sale that (1) authorizes the United States to foreclose on the taxpayer’s subject property and (2) describes how the proceeds of sale should be distributed. Taxpayers can initiate a suit in a U.S. district court to oppose those enforcement actions or sue for a refund.<sup>104</sup>

Figure 3.12 shows the number of levies, liens, and seizures during the past 15 fiscal years. Some of the low numbers in recent years are attributable in part to measures taken during the COVID-19 pandemic with respect to collection efforts, but overall, the downward trend began much earlier, corresponding with a decline in the number of IRS collection personnel.<sup>105</sup> Levies and liens in FY 2024 both show a slight uptick from FY 2023 but remain well below historic numbers. The number of seizures in FY 2024 reached an all-time low of 71.<sup>106</sup>

**FIGURE 3.12**<sup>107</sup>



## REFUND LITIGATION

A taxpayer who believes the IRS has erroneously assessed or collected tax may file a refund suit in a U.S. district court or the Court of Federal Claims to recover the amount.<sup>108</sup> The taxpayer generally must fully pay the tax assessed by the IRS prior to bringing the suit.<sup>109</sup> The full payment requirement is a key difference

104 We discuss refund suits separately in this section.

105 See Robert A. Warren et al., *Rendering Unto Caesar What Is Owed: Collecting Taxes Receivable*, TAX NOTES, Dec. 20, 2021, at 1724, <https://www.taxnotes.com/tax-notes-today-federal/tax-system-administration/rendering-unto-caesar-what-owed-collecting-taxes-receivable/2021/12/20/7cnwr>.

106 IRS, Activity Report 5000-24 (Oct. 7, 2024); IRS, Activity Report 5000-25 (Sept. 30, 2024).

107 IRS, Pub. 55-B, IRS Data Book FY 2010, <https://www.irs.gov/pub/irs-soi/10databk.pdf>, through IRS, Pub. 55-B, IRS Data Book FY 2023, <https://www.irs.gov/pub/irs-pdf/p55b.pdf> (Table 27 Delinquent Collection Activities, Fiscal Years); IRS, Activity Report 5000-24 (Oct. 7, 2024); IRS, Activity Report 5000-25 (Sept. 30, 2024).

108 The district courts and Court of Federal Claims generally have concurrent jurisdiction over tax refund suits. See 28 U.S.C. § 1346(a)(1); see also IRC §§ 6511, 6532, 7422.

109 See *Flora v. United States*, 362 U.S. 145 (1960).

between a refund suit and a suit brought in Tax Court, where a taxpayer can challenge a determination of tax liability prior to paying the disputed amount.<sup>110</sup>

Before bringing a refund suit, IRC § 7422 requires that the taxpayer file an administrative refund claim with the IRS. The refund claim must comply with requirements related to the adequacy of the filing, including that the taxpayer sign and verify the claim.<sup>111</sup> It must also generally be filed within three years from the time the return was filed or two years from the time the tax was paid, whichever expires later.<sup>112</sup> If the IRS disallows a refund claim or does not act within six months of filing, the taxpayer may then bring a refund suit in court.<sup>113</sup> When the IRS's preliminary findings in examination are to disallow the claim, the taxpayer is generally allowed to appeal administratively. If agreement is not reached during the examination or appeals process, the IRS issues a statutory notice of claim disallowance that explains the taxpayer's right to file a refund suit.<sup>114</sup> Taxpayers must generally file a refund suit within two years beginning on the mailing date of the notice of claim disallowance, although the taxpayer and IRS may agree to extend this period.<sup>115</sup>

In FY 2024, 668 refund cases remained in inventory, down from the FY 2023 total of 712. U.S. district courts presided over 408 of these cases, while 260 went before the U.S. Court of Federal Claims.<sup>116</sup>

## CRIMINAL TAX VIOLATIONS

Those who try to cheat the system by breaking the tax laws are on the radar of law enforcement. Criminal violations of the IRC are investigated at the federal level exclusively by the IRS Criminal Investigation (CI) Division. In FY 2024, IRS CI identified a total of \$9.15 billion in financial crimes, including \$2.12 billion worth of tax fraud.<sup>117</sup>

In FY 2023, nearly 70 percent of IRS CI's direct investigative time was dedicated to tax crimes. IRS CI investigates abusive tax schemes, international tax fraud, employment tax fraud, identity theft, corporate tax fraud, cybercrimes, and other tax crimes.<sup>118</sup> In FY 2024, IRS CI initiated 2,667 investigations, including 1,373 for tax crimes. Of the tax crimes IRS CI investigated, it referred 674 to the DOJ for prosecution in U.S. district courts.<sup>119</sup> Data derived from the U.S. Courts Federal Judiciary Caseload Statistics for the period March 2023 through March 2024 shows 291 criminal tax fraud cases were commenced in U.S. district courts, a nearly 15 percent reduction compared to the prior year.<sup>120</sup> From March 31, 2023, through March 31, 2024, 380

110 The full payment requirement is unfair to taxpayers as it limits the ability to file suit if they are unable to pay the disputed amount. Equal access to justice should allow taxpayers who cannot pay what the IRS says they owe to have the same opportunities to challenge a determination as wealthier taxpayers. See National Taxpayer Advocate 2022 Purple Book, *Compilation of Legislative Recommendations to Strengthen Taxpayer Rights and Improve Tax Administration 96 (Repeal Flora: Give Taxpayers Who Cannot Pay the Same Access to Judicial Review as Those Who Can)*, [https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2022/01/ARC21\\_PurpleBook\\_07\\_StrengthTPR\\_48.pdf](https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2022/01/ARC21_PurpleBook_07_StrengthTPR_48.pdf); National Taxpayer Advocate 2025 Purple Book, *Compilation of Legislative Recommendations to Strengthen Taxpayer Rights and Improve Tax Administration (Expand the U.S. Tax Court's Jurisdiction to Hear Refund Cases)*.

111 IRC §§ 6061(a), 6065; Treas. Reg. §§ 1.6012-1(a)(5), 1.6065-1(a), 301.6402-2(b)(1), (e).

112 IRC § 6511.

113 IRC § 6532(a)(1).

114 See IRM 4.10.11.2.16(1), Claims for Refund - Post Examination Appeal Rights (Sept. 29, 2022), [https://www.irs.gov/irm/part4/irm\\_04-010-011](https://www.irs.gov/irm/part4/irm_04-010-011).

115 IRC § 6532(a). Whether the IRS will agree to an extension depends on the facts and circumstances of each case, including whether an extension will prevent possible inequities to taxpayers. See IRM 4.10.11.2.16.1.1(5), IRC 6532 Two-Year Period to File Refund Suit - Consideration and Examiner's Responsibilities (Sept. 29, 2022), [https://www.irs.gov/irm/part4/irm\\_04-010-011](https://www.irs.gov/irm/part4/irm_04-010-011).

116 Data compiled by Chief Counsel (Nov. 11, 2024); Counsel Automated Tracking System, TL-712. Does not include cases on appeal or declaratory judgments.

117 IRS, Pub. 3583, Internal Revenue Service: Criminal Investigation Annual Report (Nov. 2024), <https://www.irs.gov/compliance/criminal-investigation/irs-criminal-investigation-annual-reports>.

118 IRS, Pub. 3583, Internal Revenue Service: Criminal Investigation Annual Report (Nov. 2023), <https://www.irs.gov/compliance/criminal-investigation/irs-criminal-investigation-annual-reports>.

119 *Id.*

120 U.S. Courts' 2024 Federal Judicial Caseload Statistics, Table D-2, U.S. District Courts - Criminal Defendants Commenced (Excluding Transfers), by Offense. Data is from the 12-month period between March 31, 2023, and March 31, 2024, <https://www.uscourts.gov/statistics/table/d-2/federal-judicial-caseload-statistics/2024/03/31>.

defendants appeared in district courts for criminal tax fraud offenses, and 350 entered guilty pleas. Trials were held in 17 criminal tax fraud cases. Fifteen criminal tax cases were by jury trial. Additionally, only a single trial ended in acquittal.<sup>121</sup>

## **MOST LITIGATED ISSUES – NATIONAL TAXPAYER ADVOCATE RECOMMENDATIONS TO MITIGATE DISPUTES**

The National Taxpayer Advocate recommends that Congress:

- Amend IRC § 6751(b)(1) to clarify that no penalty under Title 26 shall be assessed or entered in a final judicial decision unless the penalty is approved (in writing) by the immediate supervisor of the individual making such determination or such higher-level official as the Secretary may designate, *prior to the first time the IRS sends a written communication to the taxpayer proposing the penalty as an adjustment.*<sup>122</sup>
- Amend IRC § 6751(b)(2)(B) to clarify that the exception for “other penalties automatically calculated through electronic means” does not apply to the penalty for “negligence or disregard of rules or regulations” under IRC § 6662(b)(1).<sup>123</sup>
- Amend IRC § 7602(c) to require the IRS to provide taxpayers with a tailored notice that identifies the specific information it plans to request from a third party. Before the IRS seeks such information from a third party, it should give taxpayers a reasonable period of time to respond to the notice, including by providing the required information, unless an exception under IRC § 7602(c)(3) applies.<sup>124</sup>
- Amend IRC § 7433(d)(1) to provide that before a taxpayer may file a civil action, the taxpayer must first file an administrative claim with the IRS within two years from the date a right of action accrues. Additionally, amend IRC § 7433(d)(3) to allow taxpayers to file a civil action in a U.S. district court (i) no earlier than six months from the date on which the administrative claim was filed, and (ii) no later than the earlier of two years from the date on which the IRS sends its decision on the administrative claim to the taxpayer by certified or registered mail, or if the IRS does not render a decision, five years from the date the right of action accrued to file the administrative claim with the IRS.<sup>125</sup>
- Amend IRC § 6532(a) to remove subsection (a)(4) and provide that where a taxpayer has submitted a written request for reconsideration of a disallowed claim by Appeals within two years of the mailing of a notice of claim disallowance, the time to bring a suit for refund shall not expire before the later of

121 U.S. Courts’ 2024 Federal Judicial Caseload Statistics, Table D-4, U.S. District Courts – Criminal Defendants Disposed of, by Type of Disposition and Offense. Data is from the 12-month period between March 31, 2023, and March 31, 2024, <https://www.uscourts.gov/statistics/table/d-4/federal-judicial-caseload-statistics/2024/03/31>.

122 For further discussion, see National Taxpayer Advocate 2025 Purple Book, *Compilation of Legislative Recommendations to Strengthen Taxpayer Rights and Improve Tax Administration (Clarify That Supervisory Approval Is Required Under IRC § 6751(b) Before Proposing Penalties)*.

123 For further discussion, see National Taxpayer Advocate 2025 Purple Book, *Compilation of Legislative Recommendations to Strengthen Taxpayer Rights and Improve Tax Administration (Require an Employee to Determine and a Supervisor to Approve All Negligence Penalties Under IRC § 6662(b)(1))*.

124 For further discussion, see National Taxpayer Advocate 2025 Purple Book, *Compilation of Legislative Recommendations to Strengthen Taxpayer Rights and Improve Tax Administration (Require the IRS to Specify the Information Needed in Third-Party Contact Notices)*.

125 For further discussion, see National Taxpayer Advocate 2025 Purple Book, *Compilation of Legislative Recommendations to Strengthen Taxpayer Rights and Improve Tax Administration (Extend the Time Limit for Taxpayers to Sue for Damages for Improper Collection Actions)*. While a claim for damages under IRC § 7433(d)(3) is pending at the administrative level, the two-year period for filing suit in a U.S. district court continues to run. If a taxpayer files an administrative claim during the final six months of the two-year period, the taxpayer may be forced to file suit in a U.S. district court before the IRS has an opportunity to render a decision on the administrative claim (or else will forfeit the right to do so). This legislative recommendation would eliminate the need to file suit until the IRS has fully considered the claim. If the claim is settled, it would eliminate the need for litigation.

- (i) the standard two-year period provided in IRC § 6532(a)(1) or (ii) six months after the date of the Appeals closing letter.<sup>126</sup>
- Amend IRC § 7403 to codify current Internal Revenue Manual administrative protections, including that an IRS employee must receive executive-level written approval to proceed with a lien foreclosure suit referral. Additionally, amend IRC § 7403 to preclude the IRS from requesting that DOJ file a civil action in a U.S. district court seeking to enforce a tax lien and foreclose on a taxpayer's principal residence, except where the IRS has determined that:
    1. The taxpayer's other property or rights to property, if sold, would be insufficient to pay the amount due, including the expenses of the proceedings, and no reasonable alternative exists for collection of the taxpayer's debt;
    2. The foreclosure and sale of the residence would not create an economic hardship due to the financial condition of the taxpayer; and
    3. If the property to be levied is owned by the taxpayer but is used as the principal residence of the taxpayer's spouse, former spouse, or minor child, the IRS has sent a notice addressed in the name of the taxpayer's spouse or ex-spouse, individually or on behalf of any minor children.<sup>127</sup>
  - Amend IRC §§ 7442 and 7422 to give the Tax Court jurisdiction to determine liabilities in refund suits to the same extent as the U.S. district courts and the U.S. Court of Federal Claims.<sup>128</sup>
  - Amend IRC § 6330(c)(2)(B) to allow taxpayers to raise challenges to the existence or amount of the underlying tax liability at a CDP hearing for any tax period if the taxpayer did not receive a valid notice of deficiency for such liability, or in a non-deficiency case, the taxpayer did not have an opportunity to dispute the liability in the U.S. Tax Court. Also, clarify that IRC § 6330(c)(4)(A) applies only to collection issues and not to liability issues, which are addressed exclusively in IRC § 6330(c)(2)(B).<sup>129</sup>
  - Amend IRC § 6212 to require the Secretary to establish procedures to send a notice of international information return (IIR) penalties to the taxpayer by certified mail or registered mail for adjudication with the U.S. Tax Court prior to assessing any IIR penalty or other IIR penalty listed in Chapter 61, Subchapter A, Part III, Subpart A of the IRC.<sup>130</sup>
  - Amend IRC § 6402 to require the IRS to act on timely claims for credit or refund within 12 months by allowing the claim (in whole or in part), disallowing the claim (in whole or in part), or initiating an audit of the tax year for which the taxpayer made the claim. Additionally, provide that if the IRS fails to act on a timely refund claim within 12 months, it must pay interest at the rate set forth in

126 For further discussion, see National Taxpayer Advocate 2025 Purple Book, *Compilation of Legislative Recommendations to Strengthen Taxpayer Rights and Improve Tax Administration (Extend the Deadline for Taxpayers to File a Refund Suit When They Request Appeals Reconsideration of a Notice of Claim Disallowance But the IRS Has Not Timely Decided Their Claim)*. On occasion, taxpayers have sought to refresh time-barred claims by filing later claims that are identical or substantially identical. We do not recommend Congress permit such end-runs around the rule, and the courts generally have not allowed them. See *Peretz v. United States*, 148 Fed. Cl. 586, 607 (2020) ("This court and its predecessor courts, as well as courts in other circuits, have long held that repetitively filed claims do not extend the time for which a plaintiff can file suit under 26 U.S.C. § 6532.") and cases cited therein. If Congress is concerned about potential abuse, it could modify our recommendation to provide that an extension beyond two years will only be permitted for the first refund claim filed for a tax period.

127 For further discussion, see National Taxpayer Advocate 2025 Purple Book, *Compilation of Legislative Recommendations to Strengthen Taxpayer Rights and Improve Tax Administration (Provide Taxpayer Protections Before the IRS Recommends the Filing of a Lien Foreclosure Suit on a Principal Residence)*. For legislative language generally consistent with this recommendation, see Small Business Taxpayer Bill of Rights Act of 2015, H.R. 1828, 114th Cong. § 16 (2015); Small Business Taxpayer Bill of Rights Act of 2015, S. 949, 114th Cong. § 16 (2015); and Eliminating Improper and Abusive IRS Audits Act of 2014, S. 2215, 113th Cong. § 8 (2014).

128 For further discussion, see National Taxpayer Advocate 2025 Purple Book, *Compilation of Legislative Recommendations to Strengthen Taxpayer Rights and Improve Tax Administration (Expand the U.S. Tax Court's Jurisdiction to Hear Refund Cases)*.

129 For further discussion, see National Taxpayer Advocate 2025 Purple Book, *Compilation of Legislative Recommendations to Strengthen Taxpayer Rights and Improve Tax Administration (Provide That "an Opportunity to Dispute" an IRS-Determined Tax Liability in a Collection Due Process Hearing Includes an Opportunity to Dispute Such Liability in the U.S. Tax Court)*.

130 For further discussion, see National Taxpayer Advocate 2025 Purple Book, *Compilation of Legislative Recommendations to Strengthen Taxpayer Rights and Improve Tax Administration (Provide That Assessable Penalties Are Subject to Deficiency Procedures)*.

IRC § 6621(a)(1), plus two percentage points, on the amount of the claim ultimately allowed. Also, amend IRC § 6402 to give the IRS the authority to rescind a Notice of Claim Disallowance with the written consent of the taxpayer.<sup>131</sup>

- Amend IRC §§ 6320(a)(3)(B), 6330(a)(3)(B), and 6330(d)(1) to allow 90 days (*i.e.*, an additional 60 days) (i) to request a CDP hearing after the issuance of a CDP lien or levy notice and (ii) to file a petition for review in the Tax Court after the issuance of a notice of determination if the notice is addressed to a person outside the United States.<sup>132</sup>
- Amend IRC §§ 24(g), 25A(b), and 32(k) to require independent managerial review and written approval based on consideration of all relevant facts and circumstances before the IRS may assert a multiyear ban.<sup>133</sup>
- Amend IRC § 6214 to clarify that the Tax Court has jurisdiction (i) to review the IRS's final determination to impose a multiyear ban under IRC §§ 24(g), 25A(b), or 32(k) in any proceeding involving the years in which the notice of deficiency disallows CTC, Credit for Other Dependents, American Opportunity Tax Credit, or EITC on the basis of a multiyear ban and (ii) to allow the affected credit if it finds a multiyear ban was improperly imposed and the taxpayer otherwise qualifies for the credit.<sup>134</sup>
- Amend IRC § 6330(d)(1) to grant the Tax Court jurisdiction to determine overpayments for the tax periods at issue and to order refunds or credits in a CDP case, subject to the limitations of IRC §§ 6511(a) and 6512(b)(3), if the court determines that the taxpayer's underlying tax liability for a taxable year is less than the amounts paid or credited for that year.<sup>135</sup>
- Enact a new section of the tax code to clarify that the time periods in the code within which taxpayers may petition the Tax Court or file suit in other federal courts are not jurisdictional and are subject to equitable judicial doctrines. Specify that equitable tolling periods are included in timeliness determinations for purposes of enjoining any actions or proceedings or ordering any refunds or relief.<sup>136</sup>
- Amend IRC § 7456(a) to expand the authority of the Tax Court to issue subpoenas directing the production of records held by a third party prior to a scheduled hearing.<sup>137</sup>
- Amend IRC § 6015(e)(7)(A) and (B) and revise IRC § 6015(e)(7) to provide: "The standard and scope of review of any petition or request for relief filed under this section in the Tax Court or other court of competent jurisdiction shall be *de novo*."<sup>138</sup>

131 For further discussion, see National Taxpayer Advocate 2025 Purple Book, *Compilation of Legislative Recommendations to Strengthen Taxpayer Rights and Improve Tax Administration (Require the IRS to Timely Process Claims for Credit or Refund)*.

132 For further discussion, see National Taxpayer Advocate 2025 Purple Book, *Compilation of Legislative Recommendations to Strengthen Taxpayer Rights and Improve Tax Administration (Give Taxpayers Abroad Additional Time to Request a Collection Due Process Hearing and to File a Petition Challenging a Notice of Determination in the Tax Court)*.

133 For further discussion, see National Taxpayer Advocate 2025 Purple Book, *Compilation of Legislative Recommendations to Strengthen Taxpayer Rights and Improve Tax Administration (Require Independent Managerial Review and Written Approval Before the IRS May Assert Multiyear Bans Barring Taxpayers From Receiving Certain Tax Credits and Clarify That the Tax Court Has Jurisdiction to Review the Assertion of Multiyear Bans)*.

134 *Id.*

135 For further discussion, see National Taxpayer Advocate 2025 Purple Book, *Compilation of Legislative Recommendations to Strengthen Taxpayer Rights and Improve Tax Administration (Authorize the U.S. Tax Court to Order Refunds or Credits in Collection Due Process Proceedings Where Liability Is at Issue)*.

136 For further discussion, see National Taxpayer Advocate 2025 Purple Book, *Compilation of Legislative Recommendations to Strengthen Taxpayer Rights and Improve Tax Administration (Promote Consistency With the Supreme Court's Boechler Decision by Making the Time Limits for Bringing All Tax Litigation Subject to Equitable Judicial Doctrines)*.

137 For further discussion, see National Taxpayer Advocate 2025 Purple Book, *Compilation of Legislative Recommendations to Strengthen Taxpayer Rights and Improve Tax Administration (Authorize the Tax Court to Sign Subpoenas for the Production of Records Held by a Third Party Prior to a Scheduled Hearing)*.

138 For further discussion, see National Taxpayer Advocate 2025 Purple Book, *Compilation of Legislative Recommendations to Strengthen Taxpayer Rights and Improve Tax Administration (Provide That the Scope of Judicial Review of Innocent Spouse Determinations Under IRC § 6015 Is De Novo)*.



- Amend IRC §§ 6015 and 66 to clarify that taxpayers are entitled to raise innocent spouse relief as a defense in proceedings brought under any provision of Title 26 (including §§ 6213, 6320, 6330, 7402, 7403, and 7422) and in cases arising under Title 11 of the United States Code.<sup>139</sup>
- Amend the flush language in IRC § 6512(b)(3) by inserting the word “original” before “due date” and striking the parenthetical clause “(with extensions).”<sup>140</sup>

## SIGNIFICANT CASES

This section describes cases decided in FY 2024 that involve issues of general importance to federal tax administration and taxpayer rights.<sup>141</sup>

### An Inflection Point in Administrative Law

The Supreme Court’s decision in *Loper Bright Enterprises v. Raimondo*<sup>142</sup> marks a significant shift in administrative law by overturning the long-standing *Chevron* deference doctrine. Previously, under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*,<sup>143</sup> courts deferred to administrative agencies’ interpretations of ambiguous statutes if those interpretations were reasonable. The *Loper Bright* ruling now requires that courts independently determine the *best* interpretation of an ambiguous statute rather than deferring to any *reasonable* agency construal. However, the decision makes it clear that agency interpretations will still be given consideration by the judiciary. This move has far-reaching implications for areas of law requiring interpretation, including tax administration.

### Broad vs. Narrow Grants of Authority

IRC § 7805 grants the Secretary of the Treasury broad authority to “prescribe all needful rules and regulations for the enforcement” of the tax code.<sup>144</sup> Historically, this broad delegation of authority allowed the IRS to issue interpretive regulations and guidance with substantial flexibility, often relying on *Chevron* deference to uphold its interpretations of ambiguous statutory language.

However, after *Loper Bright*, courts may scrutinize tax regulations more closely to make sure they align directly with specific statutory text. Courts might view broad grants of regulatory authority, like those under IRC § 7805, with skepticism unless the language of the statute explicitly supports the regulation in question.

### Potential Challenges to Broad Regulatory Interpretation

Regulations that rely on broad or ambiguous grants of authority, such as those that impose significant obligations or penalties on taxpayers, may be especially at risk. This vulnerability could lead to an uptick in litigation as taxpayers contest regulations they see as unsupported by the statute’s plain text.

In practical terms, this could affect high-stakes areas of tax law, such as the IRS’s regulations on controlled foreign corporations, partnerships, and international tax regimes. But even procedural tax regulations could be subject to heightened scrutiny, particularly if they impose obligations that are not explicitly authorized by the statutory text.

139 For further discussion, see National Taxpayer Advocate 2025 Purple Book, *Compilation of Legislative Recommendations to Strengthen Taxpayer Rights and Improve Tax Administration (Clarify That Taxpayers May Raise Innocent Spouse Relief as a Defense in Collection, Bankruptcy, and Refund Cases)*.

140 For further discussion, see National Taxpayer Advocate 2025 Purple Book, *Compilation of Legislative Recommendations to Strengthen Taxpayer Rights and Improve Tax Administration (Fix the Donut Hole in the Tax Court’s Jurisdiction to Determine Overpayments by Non-Filers With Filing Extensions)*.

141 When identifying the ten most litigated issues, TAS analyzed federal court decisions issued during the period beginning October 1, 2023, through September 30, 2024 (FY 2024). For purposes of this section, we used the same period. For a list of taxpayer rights in the Taxpayer Bill of Rights (TBOR), see <https://www.taxpayeradvocate.irs.gov/taxpayer-rights> (last visited Nov. 21, 2024). The rights contained in TBOR are codified in IRC § 7803(a)(3).

142 144 S. Ct. 2244 (2024). The companion case was *Relentless, Inc. v. Dep’t of Commerce*.

143 467 U.S. 837 (1984).

144 IRC § 7805(a).

### ***Implications for the Taxpayer Right to Appeal***

Tax regulations subject to significant public interest, such as the rules stating which matters cannot come before Appeals, may receive greater scrutiny under the new legal framework. These proposed regulations could be vulnerable under *Loper Bright* because they arguably overstep the statutory boundaries set forth in IRC § 7803(e)(4), which codified the taxpayer right to an independent review by Appeals and the general availability of the Appeals process to all taxpayers.<sup>145</sup>

The proposed regulations place restrictions on Appeals' ability to evaluate certain issues – particularly those involving the validity of Treasury regulations and IRS notices – limiting a taxpayer's right to take advantage of the Appeals resolution process.<sup>146</sup> These regulations have already drawn criticism for potentially undermining the kind of general access to Appeals envisioned by the Taxpayer First Act.<sup>147</sup> Under the new legal landscape, courts may closely examine whether the IRS has exceeded its statutory authority in issuing such restrictive regulations, especially when the plain language of IRC § 7803(e)(4) may suggest a stronger mandate for taxpayer access to Appeals.

Congress may wish to amend IRC § 7803(e) to explicitly reinforce the independence of Appeals by ensuring that its authority to review specific matters is clearly articulated in the statute. Specific language will prevent future regulations from undermining Appeals' ability to adjudicate certain issues that Congress intended it to review. Specificity will also clarify which types of cases Congress sees as exceptions to Appeals' general availability.

### ***Conservative Future Rulemaking***

As a result of *Loper Bright*, the IRS may be forced to adopt a more conservative approach to rulemaking. The agency may focus on issuing regulations that are more tightly tethered to the language of the tax code and avoid relying on broad grants of authority that courts could deem excessive under the new standard. This may also mean a shift in how the IRS drafts regulations, perhaps with fewer interpretive rules that aim to fill in gaps left by Congress, and an increase in regulations that strictly interpret existing statutory language.

In the future, Congress may need to legislate more precisely to avoid ambiguities that could lead to disputes over regulatory authority. The IRS may also find itself revising older regulations to bring them into closer alignment with statutory text, ensuring they survive under this more stringent standard of review.

To maintain a fair and just tax system that also effectively administers the nation's tax laws, Congress may wish to clearly define and limit the scope of regulatory authority it wants the IRS to have regarding a specific statute. Specificity in delegations of rulemaking power will help reduce legal challenges and ensure IRS regulations align with statutory mandates.

### ***Taxing Undistributed Foreign Income***

In *Moore v. United States*,<sup>148</sup> the Supreme Court upheld the constitutionality of the Mandatory Repatriation Tax (MRT)<sup>149</sup> introduced by the Tax Cuts and Jobs Act of 2017 (TCJA).<sup>150</sup> The MRT imposes a one-time tax on accumulated undistributed income of U.S.-controlled foreign corporations by attributing a share of these

145 See Prop. Treas. Reg. § 301.7803-2(c)(1)-(24), which enumerates exceptions to consideration by Appeals even though these exceptions are not specifically enumerated in the Taxpayer First Act, Pub. L. No. 116-25, 133 Stat. 981 (2019), although some are arguably available in the legislative history. See, e.g., H.R. REP. No. 116-39, at 28-32 (2019).

146 For further discussion on the proposed regulations, see National Taxpayer Advocate 2023 Annual Report to Congress 135-136 (Most Serious Problem: Appeals: Despite Some Improvements, Many Taxpayers and Tax Professionals Continue to Perceive the IRS Independent Office of Appeals as Insufficiently Independent), [https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2024/01/ARC23\\_MSP\\_10\\_Appeals.pdf](https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2024/01/ARC23_MSP_10_Appeals.pdf).

147 IRC § 7803(e)(4) ("The resolution process described in paragraph (3) shall be generally available to all taxpayers.").

148 144 S. Ct. 1680 (2024).

149 IRC § 965. The MRT is also known as the "one-time transition tax."

150 TCJA, Pub. L. No. 115-97, 131 Stat. 2054 (2017).

earnings to U.S. shareholders. The taxpayers owed \$14,729 in taxes based on their pro-rata share of a U.S.-controlled foreign corporation's undistributed earnings. They paid the tax and sued for a refund, arguing the MRT was unconstitutional.<sup>151</sup>

The Court ruled that the MRT is constitutional based on Congress's taxing power in Article I of the U.S. Constitution, the nature of the MRT as an indirect tax on income, and established precedent supporting the principle that Congress can tax either an entity itself or its shareholders on undistributed income. The decision reinforces Congress's authority to impose pass-through taxation on U.S. shareholders of foreign corporations as well as confirms that accumulated foreign earnings are subject to U.S. tax.

The *Moore* decision has implications for tax administration. It provides clarity and stability in the application of tax laws involving foreign income, which support congressional measures to prevent tax avoidance through the accumulation of untaxed earnings in foreign corporations. The decision also solidifies the IRS's ability to tax undistributed income of foreign corporations through attribution to U.S. shareholders, which some argue is necessary to close loopholes that might allow tax avoidance through offshore entities.

But *Moore* leaves some questions unanswered. It does not address whether realization is a constitutional requirement for the government to tax income, and it leaves open some distinctions between direct and indirect taxes. These unresolved issues may lead to future litigation as taxpayers and the IRS seek clarity in international tax administration.

The decision's affirmation of the MRT also raises concerns about potential taxpayer burdens, as it imposes a tax liability on income that shareholders might not have personally received. This approach may lead to financial difficulties in some situations, particularly for small shareholders who may not have access to funds necessary to pay the tax.

*Moore's* impact on taxpayers extends beyond federal taxation. Some states, such as Nebraska, are interpreting *Moore* to justify taxing Subpart F income as pass-through income rather than treating it as nontaxable dividends.<sup>152</sup> This shift could affect how states tax income from controlled foreign corporations.

By addressing these issues directly, Congress can ensure the tax system remains fair and efficient while also providing clarity for taxpayers.

## U.S. Supreme Court Extends the Timeline for Regulatory Challenges

In *Corner Post v. Federal Reserve*,<sup>153</sup> the Supreme Court addressed the question of when the statute of limitations period begins to run for challenges to federal regulations under the Administrative Procedure Act (APA). The Court held that the six-year statute of limitations for APA claims starts when the plaintiff is harmed by a final agency action, not when the agency published the final action.

The decision stemmed from a dispute involving a truck stop convenience store established in 2018 that contested credit card transaction fees set by the Federal Reserve in 2011. Lower courts dismissed the suit, holding the six-year statute of limitations period expired because the period began running in 2011 when the regulations were published.<sup>154</sup>

151 Specifically, the taxpayers claimed the MRT violated the Sixteenth Amendment's requirement that taxpayers realize income before it can be taxed, as set forth in *Eisner v. Macomber*, 252 U.S. 189 (1920). The taxpayers also argued that the MRT violated the U.S. Constitution's Direct Tax Clause (art. I, § 9, cl. 4) because, in their view, it imposed an unapportioned direct tax on their shares of stock. The Supreme Court rejected both arguments, ruling that the MRT is a constitutional tax on income, not property, and that the tax could be applied even if the income had not been distributed to shareholders.

152 See, e.g., *Precision Castparts Corp. v. Neb. Dep't of Revenue*, 317 Neb. 481 (Neb. 2024).

153 144 S. Ct. 2440 (2024).

154 28 U.S.C. § 2401(a) states a complaint must be filed within six years after the right of action first accrues.

The Supreme Court reversed the decision, ruling that the plaintiff's right to challenge the regulation began in 2018 when the truck stop convenience store started operations and was first affected by the regulation, not when the Federal Reserve initially published the rule.<sup>155</sup>

This decision extends the time for bringing challenges against federal regulations.<sup>156</sup> The IRS now faces increased uncertainty because taxpayers can contest tax regulations long after implementation. The extended window for challenging regulations may also encourage more taxpayers to contest tax rules, potentially leading to increased litigation and a heavier workload for courts and Chief Counsel.

But *Corner Post* also enhances taxpayer rights, especially the *right to challenge the IRS's position and be heard*. The decision affirms that taxpayers can contest the validity of IRS regulations long after their implementation, provided they can demonstrate actual harm from the agency action.

This extended window for challenges may lead to more scrutiny of existing regulations. It also introduces a certain degree of uncertainty into the regulatory environment and may increase the administrative burden on the IRS and the courts as additional challenges emerge.

### **D.C. Circuit Overturns Tax Court's Decision Concerning the IRS's Authority to Impose International Information Return Penalties**

Last year, the National Taxpayer Advocate included *Farhy v. Commissioner*<sup>157</sup> as a significant case for tax administration because it addressed the fundamental question of the IRS's authority to assess penalties on IIRs. The Tax Court held the IRS lacked statutory authority to assess or administratively collect penalties under IRC § 6038(b). Instead, the IRS must pursue these penalties through civil litigation in federal district court.

The Tax Court's ruling emphasized that while the IRS has broad authority to assess and collect taxes and penalties, Congress must explicitly grant this authority. This ruling challenged the IRS's longstanding practice of treating IRC § 6038(b) penalties as summarily assessable without clear legislative backing. The Tax Court's decision potentially invalidated years of penalty assessments under this section, highlighting a gap in statutory authority that required judicial or legislative clarification.

This year, the D.C. Circuit reversed the Tax Court, finding that the IRC § 6038(b) penalties were assessable based on the statutory language, its structure, and the functional necessity to align with related penalties under IRC § 6038(c). The D.C. Circuit emphasized the impracticality of requiring dual-track judicial proceedings for related penalties and stressed that decades of congressional silence suggested an implicit endorsement of the IRS's assessment practices.<sup>158</sup>

Other taxpayers brought suits related to IRC § 6038(b) penalties in FY 2024. In one such case, *Mukhi v. Commissioner*,<sup>159</sup> the Tax Court followed its precedent in *Farhy*, ruling the IRS lacked authority to assess the IRC § 6038(b) penalty. The IRS filed a motion to reconsider *Mukhi* because of the D.C. Circuit's *Farhy* decision. In a well-reasoned full court opinion, the Tax Court reaffirmed its position that the IRS lacks authority to assess the

155 *Corner Post Inc. v. Fed. Rsve.*, 144 S. Ct. 2440, 2460 (2024) ("An APA claim does not accrue for purposes of § 2401(a)'s 6-year statute of limitations until the plaintiff is injured by final agency action.").

156 It remains an open question as to whether *Corner Post* is limited to substantive challenges, leaving prior precedent unchanged when it comes to a procedural claim. See *Wind River Mining Corp. v. United States*, 946 F. 2d 710 (9th Cir. 1991) (procedural claims accrue when the rule is issued).

157 160 T.C. 399 (2023), *rev'd* 100 F.4th 223 (D.C. Cir. 2024). See National Taxpayer Advocate 2023 Annual Report to Congress 173 (Most Litigated Issues: Significant Cases), [https://www.taxpayeradvocate.irs.gov/wp-content/uploads/bmsi/2024/02/ARC23\\_MostLitigatedIssues.pdf](https://www.taxpayeradvocate.irs.gov/wp-content/uploads/bmsi/2024/02/ARC23_MostLitigatedIssues.pdf).

158 The National Taxpayer Advocate believes the Tax Court correctly decided the *Farhy* case and notes that the Tax Court is not bound to follow the D.C. Circuit's decision in cases appealable to other circuits.

159 162 T.C. No. 8 (Apr. 8, 2024). The IRS filed a motion to reconsider *Mukhi* because of the D.C. Circuit's *Farhy* decision. *Mukhi v. Comm'r*, 162 T.C. No. 8 (Apr. 8, 2024), *motion for recons. filed* (June 7, 2024). On November 18, 2024, in a full Tax Court reviewed opinion it reaffirmed its position that the IRS lacks authority to assess the IRC § 6038(b)(1) penalties. *Mukhi v. Comm'r*, 163 T.C. No. 8 (Nov. 18, 2024), *adhering to on recons.*, 162 T.C. No. 8 (Apr. 8, 2024).

IRC § 6038(b)(1) penalties.<sup>160</sup> However, the *Mukhi* decision also noted that this case might create a circuit split, especially given the D.C. Circuit’s subsequent reversal of *Farhy*.<sup>161</sup> *Mukhi* highlights the ongoing legal uncertainty and potential for differing interpretations across jurisdictions until there is either a Supreme Court decision or legislative amendment clarifying the assessment authority for IRC § 6038(b) penalties.

These cases create a concern for taxpayer rights. They show how gaps or ambiguities in the tax code can lead to legal uncertainties and underscore the importance of legislative clarity to ensure fair and transparent tax administration. Collectively, these cases stress the need for explicit statutory authorization for IRS penalty assessments, which aligns with the general theme from *Loper Bright* that Congress should create less ambiguous statutes.<sup>162</sup>

### Third Circuit Holds the IRS Cannot Moot Tax Court Jurisdiction

*Zuch v. Commissioner*<sup>163</sup> primarily involves the Tax Court’s authority to dismiss a CDP case as moot when tax debts are satisfied during litigation. The taxpayer and her then-husband made \$50,000 in estimated tax payments for their 2010 taxes. When they later filed separate returns, the IRS applied the full \$50,000 to the husband’s tax liability. The taxpayer filed an amended return claiming the \$50,000 should be credited to her account, but the IRS did not adjust the allocation. The IRS then attempted to levy the taxpayer’s property to collect unpaid taxes. The taxpayer challenged this in a CDP hearing, arguing the \$50,000 should have been credited to her account, eliminating her tax liability. Appeals rejected her challenge, and she petitioned the Tax Court for review. While the Tax Court case was pending, the IRS applied the taxpayer’s refunds from other years to satisfy what it claimed she owed. The agency then moved to dismiss the case as moot.

The Tax Court granted the IRS’s motion, reasoning that there was no longer any unpaid tax liability to collect. As a result, the Tax Court concluded that there was no longer a live controversy for it to adjudicate.

The Third Circuit disagreed with the Tax Court’s dismissal, finding that the taxpayer’s claim was not moot. The appellate court’s analysis focused on several points: statutory authority, the distinction between unpaid tax and a tax liability, congressional intent, due process concerns, an ongoing controversy, and practical considerations.

The Third Circuit emphasized that the Tax Court’s jurisdiction in CDP cases is statutorily defined. Under IRC § 6330(d)(1), the Tax Court has jurisdiction to review any issue that was properly raised in the CDP hearing. The court noted that Congress did not provide any exception allowing the Tax Court to decline jurisdiction merely because the IRS claims the liability has been satisfied.

The court made a distinction between “unpaid tax” and “tax liability.” It explained that “tax liability” refers to the total amount owed to the IRS after allowance of proper credits, while “unpaid tax” is simply the amount the IRS says is due. This distinction matters because IRC § 6330(c)(2)(B) allows taxpayers to challenge their underlying tax liability in certain circumstances, which is different from challenging the unpaid tax amount.

<sup>160</sup> *Mukhi* involved significant procedural issues, including due process and excessive fines under the Fifth and Eighth Amendments, but the IRC § 6038(b) ruling aligned with the *Farhy* interpretation.

<sup>161</sup> Under *Golsen v. Comm’r*, 54 T.C. 742, 757 (1970), *aff’d*, 445 F.2d 985 (10th Cir. 1971), the Tax Court is not required to follow the D.C. Circuit Court’s decision in *Farhy* for cases arising in other circuits. Therefore, the D.C. Circuit’s *Farhy* decision is not binding on the Tax Court in *Mukhi*, which is appealable to the Eighth Circuit.

<sup>162</sup> On the theme of ambiguous statutes and circuit splits, last year we covered *Culp v. Comm’r*, 75 F.4th 196 (3d Cir. 2023), *rehear’g denied*, (Nov. 28, 2023), *cert. denied*, 144 S. Ct. 2685 (2024), discussing the Third Circuit’s ruling that the IRC § 6213(a) deficiency petition filing deadline is not jurisdictional and can be equitably tolled by the Tax Court. See National Taxpayer Advocate 2023 Annual Report to Congress 172-173 (Most Litigated Issues: *Significant Cases*), [https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2024/02/ARC23\\_MostLitigatedIssues.pdf](https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2024/02/ARC23_MostLitigatedIssues.pdf). The Tax Court continues to hold the opposite, that the deficiency petition filing deadline is jurisdictional and therefore cannot be equitably tolled. *Sanders v. Comm’r*, 161 T.C. No. 8 (Nov. 2, 2023) (“Nothing in the Third Circuit’s reasoning in *Culp* causes us to abandon or otherwise modify our application of the traditional tools of statutory construction or our holding as to the jurisdictional nature of the 90-day deficiency deadline.”). The Supreme Court denied *certiorari* in *Culp* on June 24, 2024, leaving the Third Circuit split from other circuits on the issue of the deadline being jurisdictional and, therefore, prohibiting equitable tolling.

<sup>163</sup> *Zuch v. Comm’r*, 97 F.4th 81 (3d Cir. 2024).

The Third Circuit emphasized that when Congress grants taxpayers the right to challenge what the IRS says is owed, congressional will prevails. The court found that allowing the IRS to moot a case by offsetting the disputed liability during litigation would effectively nullify the taxpayer's statutory right to challenge the underlying liability in a CDP hearing.

The court noted potential due process issues if taxpayers were denied the opportunity to challenge their tax liability before collections. It emphasized that the CDP hearing process is designed to provide taxpayers with adequate notice and a meaningful hearing before the IRS deprives them of their property.

The Third Circuit found that even if the IRS had satisfied what it claimed the taxpayer owed, there was still a live controversy. The taxpayer was still challenging whether she owed that amount in the first place, arguing the \$50,000 in estimated payments should have been credited to her account.

The court also expressed concern that allowing dismissal for mootness in such circumstances would incentivize the IRS to moot cases strategically, potentially depriving taxpayers of their right to challenge their tax liability in the Tax Court.

As a result, the Third Circuit held the Tax Court erred in dismissing the taxpayer's case as moot. It vacated the dismissal and remanded the case to the Tax Court to determine whether the taxpayer's petition is meritorious. The appellate court's decision emphasizes the importance of preserving taxpayers' statutory rights to challenge their tax liabilities and limits the IRS's ability to moot such challenges through unilateral action during litigation.

In *Greene-Thapedi v. Commissioner*,<sup>164</sup> the Tax Court established that it could dismiss CDP cases as moot when tax debts were satisfied during litigation. The decision was controversial among practitioners. The *Zuch* decision contradicts this Tax Court precedent and suggests a shift in how mootness is applied in Tax Court cases. On October 11, 2024, the IRS petitioned the U.S. Supreme Court for a writ of certiorari.<sup>165</sup>

### Litigation Trend: A Looming Wave of Employee Retention Credit Refund Litigation Due to IRS Delays

The IRS has faced increasing pressure to speed up processing Employee Retention Credit (ERC) claims.<sup>166</sup> The extensive backlog and moratorium instituted on these claims have generated widespread uncertainty for businesses relying on these refunds to maintain liquidity during the post-pandemic economic recovery.<sup>167</sup> As businesses wait for responses to their refund requests, taxpayers have started turning to the courts to move their claims forward.

Taxpayers have already filed suits in federal court seeking a refund of ERCs related to employment taxes after waiting over six months for the IRS to process their claims.<sup>168</sup> As similar claims remain unresolved, more taxpayers may take legal action.

<sup>164</sup> 126 T.C. 1 (2006).

<sup>165</sup> *Zuch v. Comm'r*, 97 F.4th 81 (3d Cir. 2024), petition for cert. filed, 2024 WL 4504215 (U.S. Oct. 11, 2024) (No. 24-416).

<sup>166</sup> The ERC made its first appearance in March 2020 in the Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, § 2301, 134 Stat. 281, 347-351 (2020), and its second appearance in the Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, Div. EE, §§ 206-207, 134 Stat. 1182, 3059-65 (2020) (Div. EE is commonly referred to as the Taxpayer Certainty and Disaster Tax Relief Act of 2020). Congress extended the availability of the ERC through September 30, 2021, and through December 31, 2021, in the case of wages paid by an eligible employer that is a recovery startup business. American Rescue Plan Act of 2021 (ARPA), Pub. L. No. 117-2, § 9651, 135 Stat. 4, 176-182 (2021), as amended by the Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, § 80604(b), 135 Stat. 429, 1341 (2021).

<sup>167</sup> As of April 2024, the IRS reported an ERC inventory of 1.4 million ERC claims. Treasury Inspector General for Tax Administration (TIGTA), Ref. No. 2024-400-068, *Management Took Actions to Address Erroneous Employee Retention Credit Claims; However, Some Questionable Claims Still Need to Be Addressed* 6 (2024), <https://www.tigta.gov/reports/audit/management-took-actions-address-erroneous-employee-retention-credit-claims-however>.

<sup>168</sup> See, e.g., *Kejya-Trusant Group LLC v. United States*, No. 1:24-cv-02592 (D. Md. Sept. 6, 2024). For a general discussion of litigating an ERC claim, see Matthew D. Lee et al., *Want to Sue the IRS for Unpaid ERC Claims? Consider These Factors*, DAILY TAX REP., Oct. 23, 2024, <https://www.bloomberglaw.com/product/tax/bloombergtaxnews/daily-tax-report/X25NJ070000000>.

Even though legislation extended the audit window for ERC claims to five years,<sup>169</sup> the uncertainty surrounding claim processing has left businesses in a precarious position. This scenario increases the likelihood that more taxpayers will pursue litigation to force review of their claims. Additionally, the IRS has acknowledged that many ERC claims will face further scrutiny due to the high risk associated with some filings.<sup>170</sup> This will likely prolong the backlog, further incentivizing businesses to seek court intervention. Unless the IRS begins expediting its review of these claims, the number of ERC-related lawsuits may continue to rise.<sup>171</sup>

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169 IRC § 3134(l), enacted through ARPA. This extended the statute of limitations period for the IRS to audit these quarters, but it did not extend the taxpayer's time to amend the associated tax returns, which is still three years. IRC § 6501.

170 IRS News Release, IR-2024-169, IRS Enters Next Stage of Employee Retention Credit Work; Review Indicates Vast Majority Show Risk of Being Improper (June 20, 2024), <https://www.irs.gov/newsroom/irs-enters-next-stage-of-employee-retention-credit-work-review-indicates-vast-majority-show-risk-of-being-improper>; see also Hale E. Sheppard, *Erroneous Refund Suits for ERCs and the Effects of a Novel Case*, TAX NOTES, Aug. 26, 2024, at 1665, <https://www.taxnotes.com/tax-notes-today-federal/credits/erroneous-refund-suits-ercs-and-effects-novel-case/2024/08/28/7kjpj>.

171 The IRS recently reported it was processing approximately 400,000 ERC claims. The agency estimated that most of those claims were eligible for the credit. IRS News Release, IR-2024-263, IRS Accelerates Work on Employee Retention Credit Claims; Agency Currently Processing 400,000 Claims Worth about \$10 Billion (Oct. 10, 2024), <https://www.irs.gov/newsroom/irs-accelerates-work-on-employee-retention-credit-claims-agency-currently-processing-400000-claims-worth-about-10-billion>.