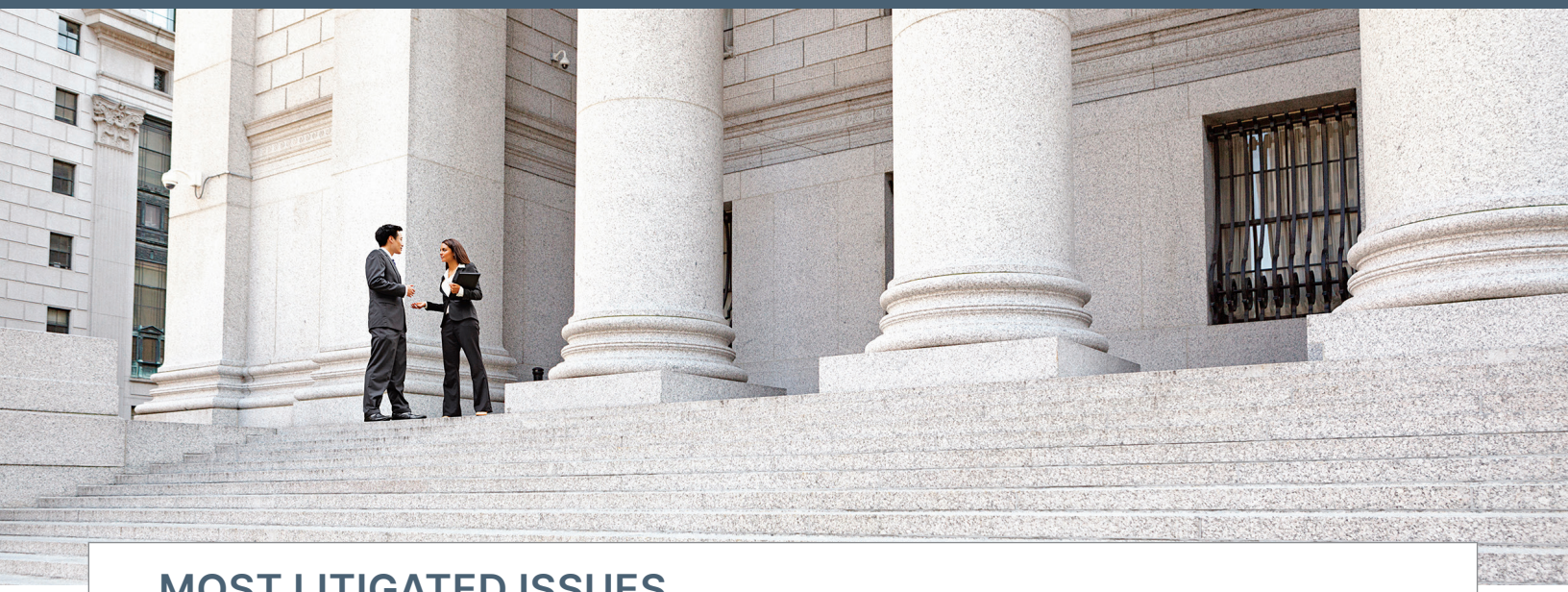


MOST LITIGATED ISSUES

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 provide 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,[1] although some taxpayers elect to give up their appeal rights and pursue binding but less formal proceedings.[2] 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:

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

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[3] and 2) the taxpayer has filed an administrative claim for refund.[4] The U.S. district courts, along with the bankruptcy courts in very limited circumstances, provide the

1 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).

2 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.

3 28 U.S.C. § 1346(a)(1). *See Flora v. United States*, 362 U.S. 145 (1960). *See* National Taxpayer Advocate 2024 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).

only forum in which a taxpayer can request a jury trial.[5] Bankruptcy courts can adjudicate tax matters not adjudicated before filing a bankruptcy case.[6]

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.[7] 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.[8] 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.[9] In fiscal year (FY) 2023, about 97 percent of all tax-related litigation was adjudicated in the Tax Court.[10]

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 2023 period from October 1, 2022, through September 30, 2023 (the reporting period).

We also reviewed the issued statutory notices of deficiency (SNDs) regarding which petitions were filed with the U.S. Tax Court during the reporting period. An SND, 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 an SND before assessing additional income tax, estate tax, gift tax, and certain excise taxes unless the taxpayer agrees to the additional assessment. An SND also starts the 90-day period in which the taxpayer can file a petition with the U.S. Tax Court.[11]

METHODOLOGY

Our analysis identified 488 court opinions, with 202 opinions issued by the Tax Court in the reporting period.[12] We also reviewed 286 court opinions from other federal courts, including from 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.[13] The total number of opinions is a 33 percent increase from the 368 cases we identified last year.[14]

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5 The bankruptcy court may only conduct a jury trial if the right to a trial by jury applies, all parties expressly consent, and the district court specifically designates the bankruptcy judge to exercise such jurisdiction. 28 U.S.C. § 157(e).

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 an SND 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 (Oct. 20, 2023); IRS, Counsel Automated Tracking System, TL-711 and TL-712. Does not include cases on appeal and declaratory judgments.

11 Note that if the SND "is addressed to a person outside 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).

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 2022 Annual Report to Congress 175 (Most Litigated Issues), https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2023/01/ARC22_MostLitigatedIssues.pdf.

The second part of our analysis identified 20,839 petitions submitted by taxpayers in FY 2023 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).[15] Only a small fraction of petitions result in a trial or court ruling on the merits. Of the 34,912 cases closed in the Tax Court in FY 2023, more than 99 percent were resolved or dismissed without a ruling on the merits.[16] We identified the issues in SNDs to determine the unagreed audit issues.[17] 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 2023, and the Examination Operational Automation Database.

Defining the Issues

In our analysis of court opinions, we define tax "issues" that lead to litigation by subject matter, such as gross income, filing status and dependents, and itemized deductions, although each subject may include many IRC sections. In our analysis of Tax Court petitions, we grouped issues based on Standard Audit Index Number (SAIN) codes, which are tracking numbers the IRS uses to provide a consistent numbering system for examination workpapers. Other issue categories are narrowly defined but frequently occur along with other underlying issues. We discuss those issues separately from the top ten Most Litigated Issues. The accuracy-related penalty (IRC § 6662), the frivolous issues penalty (IRC § 6673), and Collection Due Process (CDP) (IRC §§ 6320, 6330) are the subject of much litigation, although rarely without another underlying issue.

MOST LITIGATED ISSUES IN TAX COURT OPINIONS

We reviewed all Tax Court opinions issued during the reporting period 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 outnumbered business taxpayers 110 to 92 cases.

FIGURE 3.1, Top Tax Court Opinions Issued for Individual Taxpayers, FY 2023[18]

Ranking	Issue Category	Tax Court Opinions Discussing Issue
1	Gross Income (IRC § 61 and Related IRC Sections) and Unreported/ Underreported Income	28
2	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)
3	Innocent Spouse Relief (IRC § 6015)	9 (tie)
4	Whistleblower Award Determinations (IRC § 7623(b)(1))	8
5	Adjusted Gross Income (AGI) Exclusions and Deductions	6 (tie)
6	Judicial Review of Passport Revocation (IRC § 7345(e))	6 (tie)

15 IRS response to TAS information request (Oct. 30, 2023) (showing totals of petitions to the Tax Court during FY 2023).
16 Data compiled by the IRS Office of Chief Counsel (Oct. 20, 2023); IRS, Counsel Automated Tracking System, TL-711. Inventory pending as of September 30, 2023.
17 IRS response to TAS information request (Oct. 30, 2023). TAS matched this data to information from CDW, IMF Transaction History table for FY 2023, and the Examination Operational Automation Database (Nov. 2023).
18 In cases of a tie between categories, we listed them in alphabetical sequence. Some opinions resolved multiple substantive tax issues in the same opinion. We removed CDP hearing cases, accuracy-related penalties, managerial approval of penalties, and frivolous issues penalties from this list and separately discuss them under *Collection Due Process Hearings* (*IRC §§ 6320 and 6330*) and *Other Issues*, *infra*. The total number of individual and business issues in the top ten lists exceeds the total number of opinions we reviewed because if an opinion ruled on a Schedule C self-employment issue and another issue from the individual category, such as filing status, we included the opinion in both the individual and business tallies.

Ranking	Issue Category	Tax Court Opinions Discussing Issue
7	Schedule A Deductions (IRC §§ 211-224)	5
8	Premium Tax Credit (IRC § 36B)	3 (tie)
9	Ten Percent Additional Tax on Early Distributions From Qualified Retirement Plans (IRC § 72(t))	3 (tie)
10	Attorney Fees (IRC § 7430)	2 (tie)
11	Charitable Contribution Deductions (IRC § 170)	2 (tie)

FIGURE 3.2, Top Tax Court Opinions Issued for Business Taxpayers, FY 2023[19]

Ranking	Issue Category	Tax Court Opinions Discussing Issue
1	Schedule C Income and Expenses	19
2	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)	14
3	Charitable Contribution Deductions (IRC § 170)	12 (tie)
4	Gross Income (IRC § 61 and Related IRC Sections)	12 (tie)
5	Schedule A Deductions (IRC §§ 211-224)	11
6	Corporate Income (Excluding Cost of Goods Sold (COGS)) or Expenses	10 (tie)
7	Passive Activity (Schedule E) Income and Expenses	10 (tie)
8	Schedule K-1 Flow-Through Items for Forms 1120-S and 1065	9
9	AGI Exclusions and Deductions	8
10	Partnership Income (Excluding COGS) or Expenses	5

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 SND to determine the unagreed issues in each petition.[20] Figure 3.3 shows this year's most petitioned issues to the Tax Court for individuals from most to least.[21]

19 In cases of a tie between categories, we listed them in alphabetical sequence. Some opinions resolved multiple substantive tax issues in the same opinion. We removed CDP cases, accuracy-related penalties, managerial approval of penalties, and frivolous issues penalties and separately discuss them under *Collection Due Process Hearings* (*IRC §§ 6320 and 6330*) and *Other Issues*, *infra*.

20 IRS response to TAS information request (Oct. 20, 2023). TAS matched this data to information from CDW, IMF Transaction History table for FY 2023, and the Examination Operational Automation Database (Nov. 2023).

21 Our approach was calculated using IRS SAIN codes designed to consistently track issues for tax administration.

FIGURE 3.3, Top Ten Individual Taxpayer Issues Petitioned to the Tax Court, FY 2023[22]

Ranking	Issue Category	Total Petitions to Tax Court
1	Gross Income (IRC § 61 and Related IRC Sections)	13,475
2	Statutory Adjustment	5,409
3	Filing Status and Dependents	2,088
4	Family Status Related Credits	1,772
5	Payments and Credits	1,669
6	Earned Income Tax Credit (EITC)	1,608
7	Federal Income Tax Withholding	1,036
8	Schedule A Itemized Deductions Under IRC §§ 211-224	916
9	AGI Exclusions and Deductions	778
10	Taxes and Other Credits	617

Figure 3.4 shows this year's most petitioned issues to the Tax Court for businesses from most to least.[23]

FIGURE 3.4, Top Ten Business Taxpayer Issues Petitioned to the Tax Court, FY 2023[24]

Ranking	Issue Category	Total Petitions to Tax Court
1	Sole Proprietorship Trade or Business Expense	1,707
2	Sole Proprietorship Gross Income	1,228
3	Passive Activity (Schedule E) Income and Expenses	903
4	Corporate or Partnership Trade or Business Expense	358
5	Corporate or Partnership Gross Income	303
6	Taxes and Other Credits	214
7	Schedule K-1 Flow-Through Items	68
8	Charitable Contributions	47
9	Farming and Agriculture Activities – Gross Income	31
10	Balance Sheet – Stockholder Equity	29

22 IRS response to TAS information request (Oct. 20, 2023). TAS matched this data to information from CDW, IMF Transaction History table for FY 2023, and the Examination Operational Automation Database (Nov. 2023). 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.

23 Our approach here, similar to Figure 3.3, was calculated using IRS SAIN codes designed to consistently track issues for tax administration.

24 IRS response to TAS information request (Oct. 20, 2023). TAS matched this data to information from CDW, IMF Transaction History table for FY 2023, and the Examination Operational Automation Database (Nov. 2023).

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.[25] This year, it was the number one issue among those litigated in the Tax Court with 28 substantive opinions issued in cases with individuals and 12 with business taxpayers. Like in FY 2022, this issue was also the largest category of cases with 13,475 individual taxpayers who petitioned the Tax Court.[26] Among business taxpayers, the second highest total was sole proprietorship gross income with 1,228 petitions, the fifth highest was corporate or partnership gross income with 303 petitions, and the ninth highest was farming and agriculture activities gross income with 31 taxpayers who petitioned the Tax Court.[27]

Schedule A Deductions (IRC §§ 211-224), 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 seventh time since the National Taxpayer Advocate 2000 Annual Report to Congress.[28] In FY 2023, we identified 16 decisions in which itemized deductions were litigated in the Tax Court and 916 petitions.[29]

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 14 opinions involving businesses and nine 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. Although it did not make the top ten list for petitions in FY 2023, 164 taxpayers petitioned the Tax Court about these penalties and additions to tax.

Sole Proprietorships and Schedule C Income and Expenses

This litigation typically focuses on applying well-settled legal principles, statutes, and regulations to taxpayers' particular facts and circumstances. We identified and reviewed 19 business cases where this category of issues was litigated in the Tax Court. Taxpayers petitioned the Tax Court in 1,228 cases where sole proprietorship income was at issue and 1,707 cases where sole proprietorship trade or business expenses were at issue during the examination in FY 2023.[30] This 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 2023. Trade or business deductions have been among the most litigated issues since TAS has tracked such activity.[31]

Innocent Spouse Relief (IRC § 6015)

We identified nine 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

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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. 20, 2023); IRS, CDW, IMF Transaction History table for FY 2023.
27 IRS response to TAS information request (Oct. 20, 2023); IRS, CDW, IMF Transaction History table for FY 2023.
28 This year and in previous years, charitable contribution deductions have been classified separately as a Most Litigated Issue category.
29 We counted cases involving charitable deductions separately under *Charitable Contribution Deductions*, *infra*.
30 IRS response to TAS information request (Oct. 20, 2023); IRS, CDW, IMF Transaction History table for FY 2023, and the Examination Operational Automation Database (Nov. 2023).
31 *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.

solely liable under IRC § 6015. IRC § 6015 provides three ways for a taxpayer to obtain partial or full relief 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 SAIN code to specify innocent spouse claims.

Adjusted Gross Income Exclusions and Deductions

We identified 14 cases (six individual and eight business) where the taxpayer claimed a portion of his or her income could be excluded from the calculation of AGI and was not subject to federal income tax. For example, these cases may involve a claimed net operating loss. In other cases, taxpayers argued that income was excludable under IRC §§ 121 and 132(a)(1). Some taxpayers in this category also claimed deductions for casualty losses. This category includes taxpayers claiming income from discharge of indebtedness that was excluded from gross income under IRC § 108. AGI Exclusions and Deductions was the ninth most litigated issue for individuals in petitions to the Tax Court (778).

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

Whistleblower award determinations under IRC § 7623(b)(1) made our list for the second consecutive year. We identified eight 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 – an audit or investigation resulting in the collection of proceeds.[32] Taxpayers may appeal final determinations of the IRS Whistleblower Office regarding awards under IRC § 7623(b) within 30 days of such determination.[33] In FY 2022, the Whistleblower Office issued 132 awards to whistleblowers totaling nearly $38 million, which included 26 post-petition whistleblower awards awarded under IRC § 7623(b).[34]

Charitable Contribution Deductions (IRC § 170)

We identified two opinions in individual cases and 12 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 and aggressively auditing taxpayers.[35] In FY 2023, among business taxpayers, charitable contribution deductions were the eighth most litigated issue where 47 business taxpayers petitioned the Tax Court. Although it fell short of the top ten in the individual category, it was an issue in 350 individual taxpayer petitions.[36]

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32 *See* IRS, Whistleblower Office, https://www.irs.gov/compliance/whistleblower-office (Sept. 29, 2023).
33 *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.
34 *See* IRS, Pub. 5241, Fiscal Year 2022 Annual Report IRS Whistleblower Office (June 2023), https://www.irs.gov/pub/irs-pdf/p5241.pdf.
35 *See* IRS Notice 2017-10, 2017-4 I.R.B. 544, Syndicated Conservation Easement Transactions, https://www.irs.gov/pub/irs-irbs/irb17-04.pdf (Jan. 23, 2017). Note that some courts have recently 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. No. 5 (Nov. 9, 2022) and *Green Rock, LLC v. IRS*, 654 F.Supp.3d 1249 (N.D. Ala. 2023).
36 IRS response to TAS information request (Oct. 20, 2023); IRS, CDW, IMF Transaction History table, and the Examination Operational Automation Database (Nov. 2023).

Passive Activities (Schedule E) Income and Expenses

We identified ten 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 SND. Passive activities were the subject of an SND in 903 petitions during FY 2023.

Premium Tax Credit (IRC § 36B)

The Premium Tax Credit (PTC) is a refundable credit that helps eligible individuals and families cover the premiums for their health insurance purchased through the Marketplace. Qualifying taxpayers who enroll in health insurance through a Marketplace can receive advance payments of the PTC. The Marketplace estimates the amount of PTC a taxpayer will qualify for using the taxpayer's estimated household income and family size. The taxpayer then chooses to have all, some, or none of the advance credit payments paid to the insurance provider. If a taxpayer's advance credit payments are more than his or her PTC, the taxpayer must repay the excess advance credit payments (the amount of the repayment may be limited for taxpayers with household income of less than 400 percent of the Federal Poverty Level for their family size). In three cases during FY 2023, taxpayers challenged their liability after the IRS determined they needed to repay some or all of their advance payments of the PTC.

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

IRC § 72(t)(1) imposes a ten percent penalty 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.[37] In three opinions during FY 2023, taxpayers challenged their liability for the ten percent penalty.

Filing Status and Dependents

The filing status and dependent issues 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 2,088 petitions.

Family Status Related Credits

The family status related credits category includes the Child Tax Credit (CTC), Child and Dependent Care Credit, Additional Child Tax 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 1,772 petitions. The EITC, in its own category, ranked sixth on individual taxpayer issues petitioned to the Tax Court with 1,608 petitions from individual taxpayers in FY 2023.

37 IRC § 72(t)(2)(A)-(N) provides circumstances where early distributions can be made without incurring a penalty.

Taxes 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. During FY 2023, 617 petitions included these types of issues in the individual category, making it the tenth most litigated issue for individual taxpayers. Among Schedule C and Schedule E filers, which we classified in the business category, it ranked sixth with 214 petitions.

OTHER ISSUES

This year, we tracked the issues litigated in the Tax Court and other federal courts separately. We also analyzed the accuracy-related penalty under IRC § 6662, the frivolous issues penalty under IRC § 6673, supervisory preassessment penalty approval under IRC § 6751(b)(1), and CDP litigation under IRC §§ 6320 and 6330 outside of the top ten issues framework. As the penalties are not standalone issues, we did not include these in the top ten list of Most Litigated Issues. Likewise, due to the unique nature of CDP, it is discussed separately.

Accuracy-Related Penalty (IRC § 6662(b)(1)-(2))[38]

We identified 43 total opinions issued by the Tax Court for individual and business taxpayers during the reporting period where taxpayers litigated the negligence or substantial understatement parts of the accuracy-related penalty. In FY 2023, 33 business and ten individual taxpayers petitioned the Tax Court where the accuracy-related penalty for negligence or substantial understatement of tax was an issue during the examination.[39]

Supervisory Preassessment Penalty Approval Under IRC § 6751(b)(1)

We identified 12 opinions 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."[40] 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."[41] IRC § 6751(b) protects taxpayers' *right to a fair and just tax system* by ensuring that penalties are only imposed in appropriate circumstances and are not used as a bargaining chip to encourage settlement.[42] 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

38 IRC § 6662 also includes (b)(3) through (8), but because those types of accuracy-related penalties were not heavily litigated, we have analyzed only subsections (b)(1) and (2).
39 IRS response to TAS information request (Oct. 20, 2023); IRS, CDW, IMF Transaction History table, and the Examination Operational Automation Database (Nov. 2023).
40 IRC § 6751(b)(1).
41 IRC § 6751(b)(2).
42 *See* S. Rep No. 105-174, at 65 (1998).

'assessment.'"[43] 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.[44] Thus, we continue to see litigation on this issue.[45]

Frivolous Issues Penalty (IRC § 6673)

During the reporting period, the Tax Court decided eight cases involving the IRC § 6673 frivolous issues penalty. This penalty is imposed on a taxpayer maintaining a case primarily for delay, raising arguments considered frivolous by the courts, unreasonably failing to pursue administrative remedies, or filing a frivolous appeal.[46] Occasionally, when the IRS has not requested the penalty, and the facts are appropriate, the court has nonetheless raised the issue *sua sponte*.[47] For FY 2023, 17 taxpayers were assessed the IRC § 6673(a) and (b) frivolous issue penalties totaling $96,411.[48]

Collection Due Process Hearings (IRC §§ 6320 and 6330)

Our review of litigated issues found 30 substantive opinions issued on CDP cases 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 ten years.

43 *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)).

44 *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); 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.

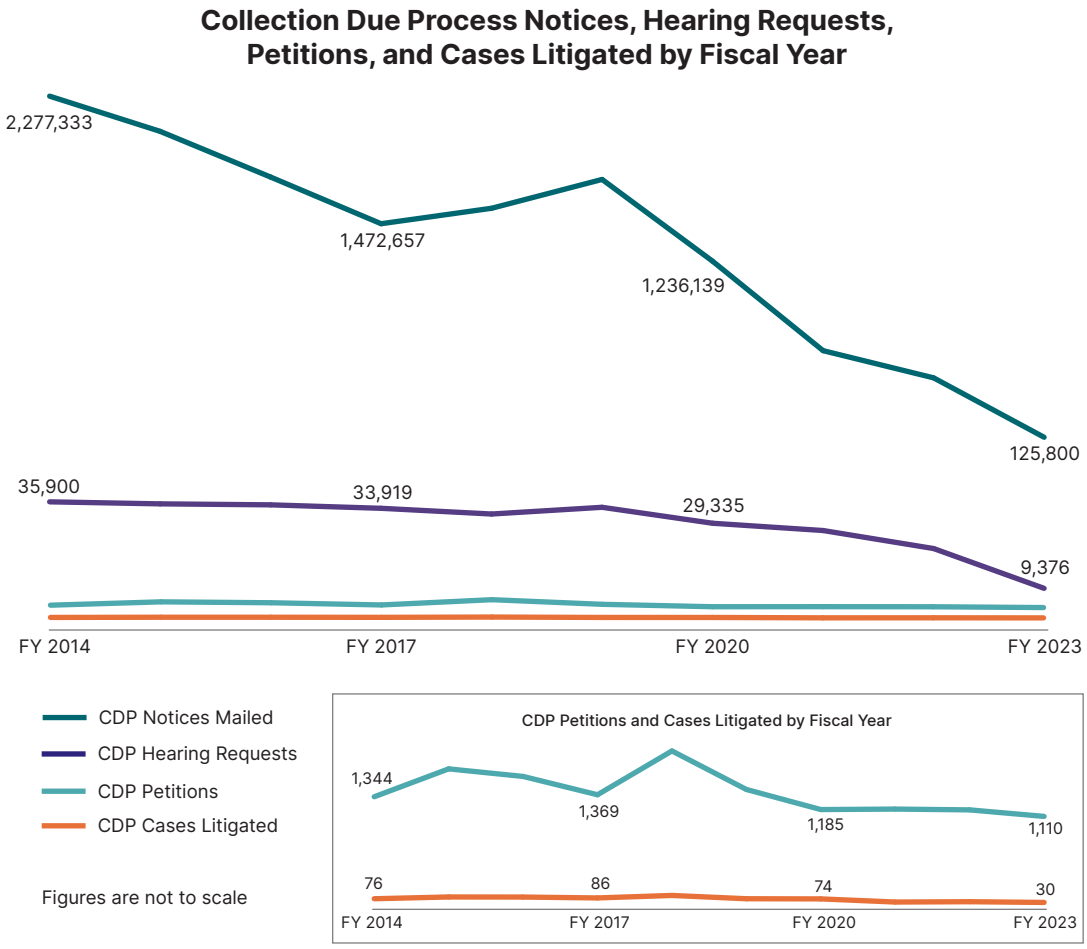
45 For a legislative recommendation on this topic, see National Taxpayer Advocate 2024 Purple Book, *Compilation of Legislative Recommendations to Strengthen Taxpayer Rights and Improve Tax Administration* (*Clarify That Supervisory Approval Is Required Under IRC § 6751(b) Before Proposing Penalties*); *see also* National Taxpayer Advocate 2023 Purple Book, *Compilation of Legislative Recommendations to Strengthen Taxpayer Rights and Improve Tax Administration* 75 (*Clarify That Supervisory Approval Is Required Under IRC § 6751(b) Before Proposing Penalties*), https://www.taxpayeradvocate.irs.gov/reports/2022-annual-report-to-congress/national-taxpayer-advocate-2023-purple-book/.

46 The Tax Court generally imposes the penalty under IRC § 6673(a)(1). Other courts may impose the penalty under IRC § 6673(b)(1). U.S. Courts of Appeals are authorized to impose sanctions under IRC § 7482(c)(4) or Rule 38 of the Federal Rules of Appellate Procedure, although some appellate-level penalties may be imposed under other authorities.

47 "*Sua sponte*" means "of his or its own will or motion; voluntarily; without prompting or suggestion." BLACK'S LAW DICTIONARY (2nd ed.), https://thelawdictionary.org/sua-sponte/ (last visited Dec. 8, 2023). For conduct that it finds particularly offensive, the Tax Court can choose to impose a penalty under IRC § 6673 even if the IRS has not requested the penalty. *See*, *e.g.*, *Wells v. Comm'r*, T.C. Memo. 2019-134.

48 IRS, CDW, IMF Transaction History table for FY 2023, and the Examination Operational Automation Database (Dec. 1, 2023).

FIGURE 3.5[49]



We recorded a slight decrease in CDP petitions, with 1,110 in FY 2023, down from 1,181 petitions in FY 2022.[50] *Pro se* taxpayers continue to make up a majority of the total cases in FY 2023, with 906 of 1,110 (82 percent) cases having unrepresented taxpayers compared to 204 (18 percent) represented taxpayers.[51] An increasing portion of CDP taxpayers are proceeding without a representative compared to the ten-year average, where an average of 70 percent cases were *pro se* compared to an average of 30 percent involving represented taxpayers over a ten-year period from FYs 2014 to 2023.[52]

49 IRS, Counsel Automated Tracking System; IRS, CDW, IMF Transaction History table (FYs 2014-2023). We identified 30 CDP case opinions issued during FY 2023. Please note that data may have changed from prior reports because some CDP transactions are posted to the Master File after the close of the fiscal year.

50 IRS, CDW, IMF Transaction History table (FYs 2014-2023). The total number of CDP petitions to the Tax Court was compiled by the IRS Office of Chief Counsel (Nov. 1, 2023). IRS, Counsel Automated Tracking System, Subtype DU. Inventory pending as of September 30, 2023. Does not include cases on appeal.

51 The total number of CDP petitions to the Tax Court was compiled by the IRS Office of Chief Counsel (Nov. 1, 2023). IRS, Counsel Automated Tracking System, Subtype DU. Inventory pending as of September 30, 2023. This does not include cases on appeal. Some CDP notices and hearings that occur during the fiscal year are recorded after the close of the fiscal year so we updated prior year numbers to reflect those later-recorded CDP notices and hearings.

52 The total number of CDP petitions to the Tax Court was compiled by the IRS Office of Chief Counsel (Nov. 1, 2023). IRS, Counsel Automated Tracking System, Subtype DU. Inventory pending as of September 30, 2023. This does not include cases on appeal. Some CDP notices and hearings that occur during the fiscal year are recorded after the close of the fiscal year so we updated prior year numbers to reflect those later-recorded CDP notices and hearings.

In FY 2023, the IRS issued 125,800 CDP notices to taxpayers (73,967 individual and 51,833 business), a sharp decline from the 500,534 notices issued to individual taxpayers in FY 2022.[53] In FY 2023, 9,376 taxpayers requested CDP hearings (5,768 individual and 3,608 business), down from 21,579 requested in FY 2022.[54] Although the number of CDP notices mailed to taxpayers has declined by more than 74 percent in the past decade, the number of hearings requested has declined by only 57 percent over the same period.[55] CDP hearings continue to play a vital role in overall tax administration by allowing taxpayers to contest a lien or levy before (or soon after) the IRS takes the collection action.

TOP ISSUES IN OTHER FEDERAL COURTS

Although our top ten issues are calculated by analyzing data from the Tax Court, where the number of docketed cases and dollars in dispute far exceed litigation in other courts, the 202 opinions from the Tax Court account for over 41 percent of the 488 total opinions we reviewed for FY 2023. In non-Tax Court opinions, total individual cases (195) were more than double business cases (91). The top three issues resulting in opinions from courts other than the Tax Court during FY 2023 were:

- Civil Actions to Enforce Federal Tax Liens or to Subject Property to Payment of Tax (IRC §§ 6321 and 7403): 44 opinions;
- Civil Actions for Refund (IRC § 7422): 38 opinions; and
- Summons Enforcement (IRC §§ 7602(a), 7604(a), and 7609(a)): 25 opinions.

Notably, in the Court of Federal Claims, there were 18 opinions related to employment tax issues during FY 2023, making it the most litigated tax issue in that court. According to our review of opinions, a substantial amount of that litigation involved airline pilots, with 128 litigants over 16 cases, all related to employment tax issues.

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

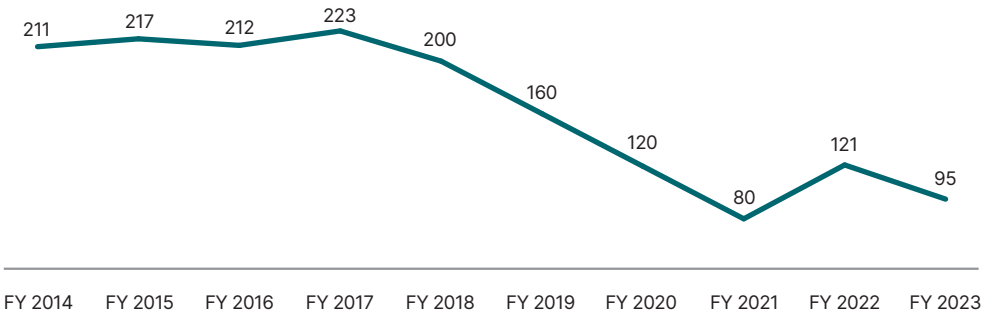
During the reporting period in FY 2023, we identified 44 opinions involving civil actions to enforce liens under IRC §§ 6321 and 7403. This is a 132 percent increase from the 19 opinions reported last year.[56]

In FY 2023, 95 federal tax lien cases were referred to the Department of Justice (DOJ) for enforcement and foreclosure, down 21 percent from the 121 cases referred in FY 2022.[57] This is a downward tick in the trend in referrals to the DOJ since last year but still greater than the lowest year, FY 2021, as shown in Figure 3.6.

53 IRS, CDW, IMF, Business Master File (BMF) (FYs 2022-2023).
54 *Id.*
55 IRS, CDW, IMF, BMF (FYs 2014-2023).
56 National Taxpayer Advocate 2022 Annual Report to Congress 182 (Most Litigated Issues), https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2023/01/ARC22_MostLitigatedIssues.pdf.
57 Based on data provided by the DOJ to the IRS Office of Chief Counsel (Oct. 18, 2023); *see also* National Taxpayer Advocate 2022 Annual Report to Congress 182 (Most Litigated Issues), https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2023/01/ARC22_MostLitigatedIssues.pdf.

FIGURE 3.6[58]

Lien Cases Referred to the U.S. Department of Justice



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

During FY 2023, 24 proceedings to quash or enjoin enforcement of a summons were filed, and ten summons enforcement proceedings were filed for 34 summons enforcement cases that either were (1) newly filed by the DOJ Tax Division or (2) filed by third parties and received by the DOJ Tax Division.[59] The DOJ handles motions to quash summonses (the United States is listed as a defendant), and the U.S. Attorney's Offices handle suits to enforce summonses (the United States is listed as a plaintiff).

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, the IRS Office of Chief Counsel (Counsel) files an answer. Counsel then generally refers the case to Appeals for settlement consideration. If the taxpayer and Appeals do not resolve the case, it is returned to Counsel, who may also settle the case.

During FY 2023, 23,119 Tax Court cases were settled, 16,963 by Appeals and 6,156 by IRS Chief Counsel.[60] Figure 3.7 shows the number of Tax Court cases settled by Appeals and IRS Chief Counsel during the last ten fiscal years.

58 Based on data provided by the DOJ to the IRS Office of Chief Counsel (Oct. 18, 2023); National Taxpayer Advocate 2022 Annual Report to Congress 182 (Most Litigated Issues), https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2023/01/ARC22_MostLitigatedIssues.pdf.

59 Data provided by the DOJ to the IRS Office of Chief Counsel (Oct. 18, 2023). The Tax Division generally only has a record of summons enforcement cases if the IRS Office of 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 2023; rather, it reflects only those for which the DOJ Tax Division opened a matter.

60 Data compiled by IRS Office of Chief Counsel (Oct. 20, 2023). IRS, Counsel Automated Tracking System, TL-708D, TL-709. Inventory pending as of September 30, 2023. Does not include cases on appeal or declaratory judgments. FY 2023 Tax Court cases settlement data provided by the IRS Office of Chief Counsel included a discrepancy of 16 cases. Therefore, the number could be as high as 23,135. The IRS Office of Chief Counsel attributed this discrepancy of 16 cases to data entry error. IRS response to TAS information request (Oct. 27, 2023).

FIGURE 3.7[61]

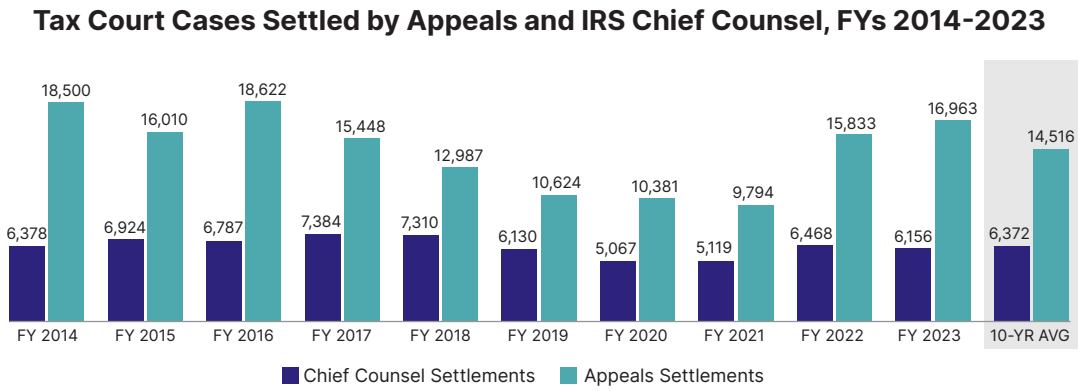


Figure 3.8 shows the outcomes of Tax Court petitions for FY 2023, with settlements broken down between Appeals and IRS Chief Counsel. Two-thirds of the cases were settled, with nearly 49 percent settled by Appeals and almost 18 percent settled by IRS Chief Counsel.

FIGURE 3.8[62]

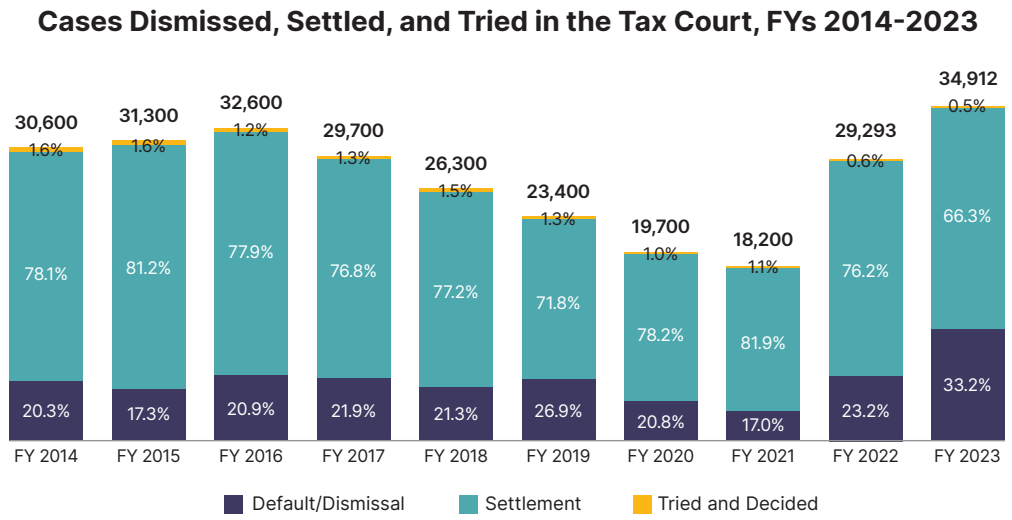


The vast majority of cases petitioned to the Tax Court are settled by agreement between the parties. Figure 3.9 illustrates the cases dismissed, settled, and tried in the Tax Court during the last ten fiscal years. In FY 2023, 66.2 percent of the Tax Court cases were closed by settlement, while 33.2 percent were dismissed or defaulted, and only one-half of one percent were tried.

61 Data compiled by IRS Office of Chief Counsel (Oct. 20, 2023). IRS, Counsel Automated Tracking System, TL-708D, TL-709. Inventory pending as of September 30, 2023. Does not include cases on appeal or declaratory judgments. FY 2023 Tax Court cases settlement data provided by the IRS Office of Chief Counsel included a discrepancy of 16 cases. Therefore, the number could be as high as 23,135. The IRS Office of Chief Counsel attributed this discrepancy of 16 cases to data entry error. IRS response to TAS information request (Oct. 27, 2023).

62 Data compiled by IRS Office of Chief Counsel (Oct. 20, 2023). IRS, Counsel Automated Tracking System, TL-708D, TL-709. Inventory pending as of September 30, 2023. Does not include cases on appeal or declaratory judgments. FY 2023 Tax Court cases settlement data provided by the IRS Office of Chief Counsel included a discrepancy of 16 cases. The IRS Office of Chief Counsel attributed this discrepancy of 16 cases to data entry error. IRS response to TAS information request (Oct. 27, 2023). The discrepancy in the number of settled cases is *de minimis* and does not change the relative percentages.

FIGURE 3.9[63]



Settlements are vital to the tax litigation process. They are beneficial because they save all parties the time and expense of a trial and provide certainty and finality. To provide settlement opportunities, IRS Chief Counsel continued to coordinate with Low Income Taxpayer Clinics (LITCs),[64] American Bar Association volunteer attorneys, and other *pro bono* organizations to offer "Settlement Days" in FY 2023. IRS Chief Counsel held 28 events, 20 of which were virtual and eight of which were in person.[65] Through Settlement Days, IRS Chief Counsel held 285 meetings and settled 187 cases, resulting in a settlement rate of almost 66 percent in FY 2023.[66] The 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.

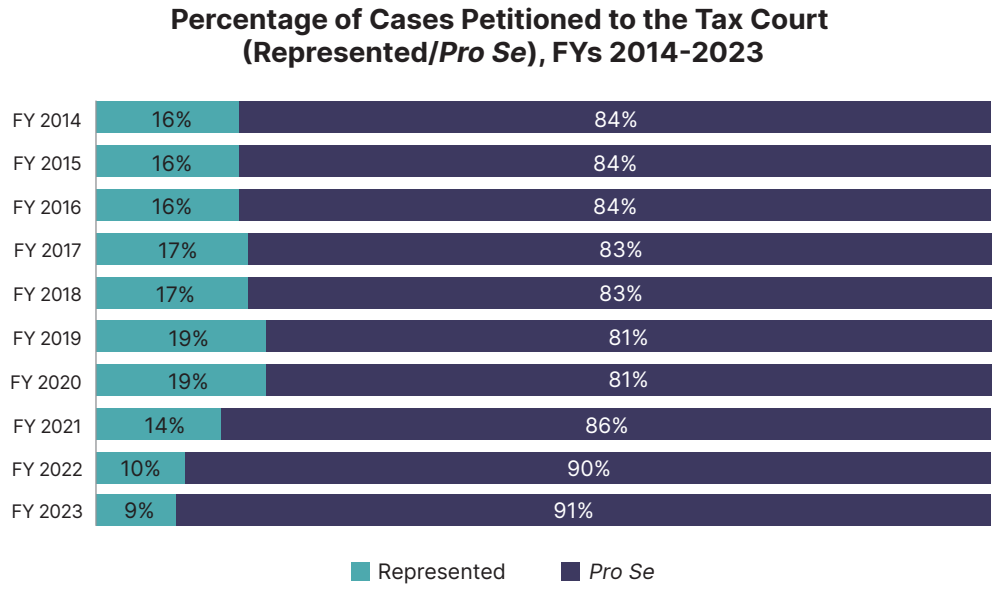
63 Data compiled by the IRS Office of Chief Counsel (Oct. 20, 2023). IRS, Counsel Automated Tracking System, TL-711. Inventory pending as of September 30, 2023. Does not include cases on appeal or declaratory judgments. FY 2023 Tax Court cases settlement data provided by the IRS Office of Chief Counsel included a discrepancy of 16 cases. The IRS Office of Chief Counsel attributed this discrepancy of 16 cases to data entry error. IRS response to TAS information request (Oct. 27, 2023). The discrepancy in the number of settled cases is *de minimis* and does not change the relative percentages.
64 *See* IRC § 7526.
65 Data compiled by IRS Office of Chief Counsel (Sept. 28, 2023).
66 *Id.*

ANALYSIS OF *PRO SE* LITIGATION

When a taxpayer appears before the court without a representative, they are appearing *pro se*.[67] In FY 2023, about 91 percent of cases petitioned to the Tax Court involved *pro se* taxpayers, and in about nine percent of the cases the taxpayers were represented.[68] Over the past ten years, an average of 84.6 percent of taxpayers appearing in Tax Court were not represented by counsel.[69] 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.

Figure 3.10 compares the ratio of Tax Court cases where taxpayers proceeded *pro se* to the cases where taxpayers appeared with a representative over the past ten fiscal years.

FIGURE 3.10[70]



67 "*Pro se*" means "for himself; in his own behalf; in person." BLACK'S LAW DICTIONARY (2nd ed.), https://thelawdictionary.org/pro-se/ (last visited Dec. 8, 2023).

68 Data compiled by IRS Office of Chief Counsel (Oct. 20, 2023), 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.

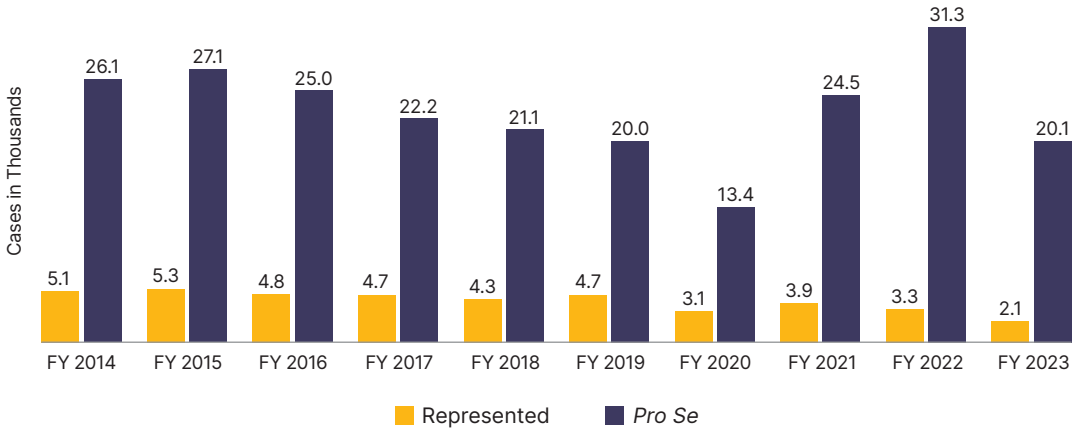
69 Data compiled by IRS Office of Chief Counsel (Oct. 20, 2023), Counsel Automated Tracking System, TL-708A.

70 *Id.*; National Taxpayer Advocate 2022 Annual Report to Congress 185 (Most Litigated Issues), https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2023/01/ARC22_MostLitigatedIssues.pdf. Does not include cases on appeal and declaratory judgments.

Figure 3.11 shows the number of Tax Court petitions over the past ten fiscal years, broken down by whether the taxpayers proceeded *pro se* or with a representative.

FIGURE 3.11[71]

Total Cases Petitioned to the Tax Court (Represented/*Pro Se*), FYs 2014-2023



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 2023) for eligible LITCs.[72] 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.[73] 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*.[74]

During 2022, 122 LITCs participated in the Tax Court Clinical Program. LITC practitioners litigated 1,537 cases in the Tax Court on behalf of low-income taxpayers and 23 cases in other federal courts.[75] LITC practitioners assisted taxpayers in many cases without litigation, entering appearances in 1,053 cases, representing taxpayers in 532 cases that did not require an entry of appearance, and providing informal advice

71 Data compiled by IRS Office of Chief Counsel (Oct. 20, 2023), Counsel Automated Tracking System, TL-708A; National Taxpayer Advocate 2022 Annual Report to Congress 185 (Most Litigated Issues), https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2023/01/ARC22_MostLitigatedIssues.pdf. Does not include cases on appeal and declaratory judgments.

72 IRS, Pub. 3319, Low Income Taxpayer Clinics Grant Application Package and Guidelines (May 2023), https://www.irs.gov/pub/irs-pdf/p3319.pdf. TAS administers and oversees the grant program through its LITC Program Office.

73 *See* U.S. Tax Court, Clinics & *Pro Bono* Programs, https://www.ustaxcourt.gov/clinics.html (last visited Dec. 8, 2023). The Tax Court continues to invite academic and non-academic tax clinics and bar-sponsored programs to consider participating and representing *pro se* taxpayers.

74 *See* IRC § 7803(a)(3)(C).

75 Email from TAS LITC Program Office (Oct. 30, 2023) (on file with TAS).

through consultation at the Tax Court in 552 cases.[76] 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.

Considering the increase in the number of LITCs since the enactment of IRC § 7526 and that the $100,000 limit[77] 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.[78] Across the LITC Program, many LITC practitioners helped taxpayers who were facing large tax bills and dwindling hope. For example, an LITC helped a taxpayer prevail in a factually and legally complex case involving a fraudulent debt claim and a coerced sale of the taxpayer's home that resulted in an $80,000 tax bill. In another case, an LITC helped a taxpayer prevail in challenging income classification and entitlement to the EITC and CTC, resulting in a refund of more than $12,000.[79] In these cases and many more, LITCs helped taxpayers achieve the fair and just result they deserved.

PUBLIC ONLINE ACCESS TO TAX COURT FILINGS

Through its engagement with LITCs and *pro bono* lawyer organizations, the U.S. Tax Court provides unrepresented taxpayers greater access to legal representation and much-needed information and assistance. However, work remains to improve access to information for all taxpayers, including full access to case dockets on par with what the Public Access to Court Electronic Records (PACER) system provides for dockets in other U.S. courts. PACER provides access to millions of case file documents and docket information for all district, bankruptcy, and appellate courts. Documents on PACER have certain personal identifiers removed or redacted before the record becomes public, including Social Security numbers, financial account numbers, the name of a minor, date of birth, and home addresses in a criminal case.[80]

IRC § 7461 governs the accessibility and publication of documents that enter the Tax Court system.[81] This section directs the Tax Court to make all non-sealed documents "public records open to the inspection of the public." There is an exception to the general rule that allows for sealing or redacting of information on the docket when disclosure would involve trade secrets or other confidential information or when the taxpayer requests the return of evidence under IRC § 7461(b). Enacted in 1954 and last amended in 1984, IRC § 7461 was written long before lawmakers contemplated issues related to online access.[82]

The Tax Court launched a new online case management system, Docket Access Within A Secure Online Network (DAWSON), in December 2020.[83] Under this system, the Tax Court allows parties to a case to access case records online. The Tax Court expanded access through DAWSON in August 2023 to include all newly filed post-trial briefs (in non-sealed cases) filed by government and non-government practitioners

76 Email from TAS LITC Program Office (Oct. 30, 2023).
77 For FY 2023, additional funding allowed LITCs to receive grants of up to $200,000. IRS, Pub. 3319, Low Income Taxpayer Clinics Grant Application Package and Guidelines (May 2023), https://www.irs.gov/pub/irs-pdf/p3319.pdf.
78 National Taxpayer Advocate 2024 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*).
79 Email from TAS LITC Program Office (Nov. 3, 2023) (on file with TAS).
80 PACER, Frequently Asked Questions, https://pacer.uscourts.gov/help/faqs/what-information-available-through-pacer (last visited Dec. 8, 2023).
81 IRC § 7461.
82 68A Stat. 887, Ch. 736 (1954); Pub. L. No. 98–369, Div. A, Title IV, § 465(a), 98 Stat. 494, 825 (1984).
83 *See* U.S. Tax Court, Press Release (Dec. 18, 2020), https://ustaxcourt.gov/resources/press/12182020.pdf.

admitted to practice before the Tax Court and all newly filed *amicus* briefs filed pursuant to Rule 151.1 of the Tax Court Rules of Practice and Procedure.[84] In FY 2023, about ten percent of petitioners to the Tax Court were represented by a practitioner admitted to practice before the Tax Court.[85]

Tax Court Rule 27 provides privacy protections for filings made with the Tax Court. It requires parties and nonparties to redact the following information from court filings: (1) taxpayer identification numbers, (2) dates of birth (just the year is permissible), (3) names of minor children, and (4) financial account numbers.[86] The Tax Court limits access to pleadings on DAWSON because filings don't always have the necessary redactions to comply with Rule 27, and the Tax Court seeks to prevent the inadvertent disclosure of confidential information.

Non-sealed evidence, briefs, pleadings, and transcripts of proceedings not offered through electronic access to nonparties can only be accessed by visiting the Tax Court building in Washington, D.C., during normal business hours (between 8 a.m. and 4:30 p.m., excluding federal holidays). A nonparty who visits the building and who seeks to view the non-sealed documents on a particular docket can visit the Tax Court's record office on its ground floor (after clearing an identity check at the security office), which allows access to this unsealed information through a single desktop computer.

Records can also be accessed by calling the Tax Court records department and requesting items on a particular docket by telephone. However, the nonparty would need to provide information about the specific document, date, and docket number for the request. Without first seeing the docket, the nonparty may be unable to provide the necessary information to request the correct records by phone. Printouts of non-sealed records must be requested from the Tax Court records department at a cost of 50 cents per page, with a maximum charge of $3 per document.[87]

The Tax Court serves a practical purpose of protecting taxpayers' data and protecting all litigants from unnecessary disclosure of private data by limiting access to court records in an electronic format. However, the Tax Court could expand electronic access to non-sealed documents on dockets without violating privacy rights by 1) using redaction software that would automatically redact certain types of sensitive or protected information, even when inadvertently included in a filing and 2) improving awareness and educational materials for unrepresented taxpayers to alert the Tax Court before filing documents with the Tax Court if they have a special need to redact information from publicly available filings. Taxpayers deserve access and transparency in our court system and tax administration regardless of where they are located.

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 an SND. The SND 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 SND, starts the period in which a taxpayer must file a petition with the Tax Court.[88]

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84 U.S. Tax Court, Admin. Ord. 2023-02, *Expanding Remote Electronic Access to Certain Court Documents* (May 5, 2023), https://www.ustaxcourt.gov/resources/administrative_orders/Administrative_Order_2023-02.pdf.

85 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. T.C. R. 200, https://www.ustaxcourt.gov/resources/ropp/Rule-200(2nd-amended).pdf.

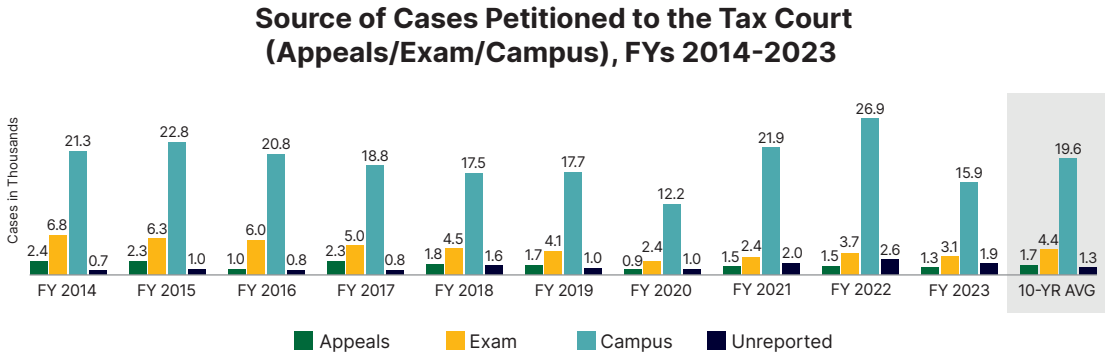
86 T.C. R. 27(b), https://www.ustaxcourt.gov/rules.html.

87 U.S. Tax Court, Transcripts and Copies, https://www.ustaxcourt.gov/transcripts_and_copies.html (last visited Dec. 1, 2023).

88 If a taxpayer receives an SND and wishes to have the Tax Court hear the case, he or she must file a petition with the Tax Court within 90 days of the date that the SND was mailed (or 150 days if the SND 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.

Figure 3.12 shows Tax Court petition filings over the last ten fiscal years based on the IRS function that issued the notice attached to each petition.

FIGURE 3.12[89]



From FY 2022 to FY 2023, petition filings declined in all categories. Petitions arising from Campuses saw the largest real decrease, with about 11,000 fewer petitions compared to last year. However, Campuses remain the most significant source of petitions filed, consistent with the trend over the past decade. On average over the past ten fiscal years, about 72 percent of petitions in the Tax Court resulted from an SND being issued from a Campus.[90]

When an SND is issued from a Campus, it is highly likely that the taxpayer has not even spoken with an IRS employee. Even for taxpayers who seek interaction at the Examination 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.[91] 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 2023, although Tax Court inventory sharply declined from last year's numbers.

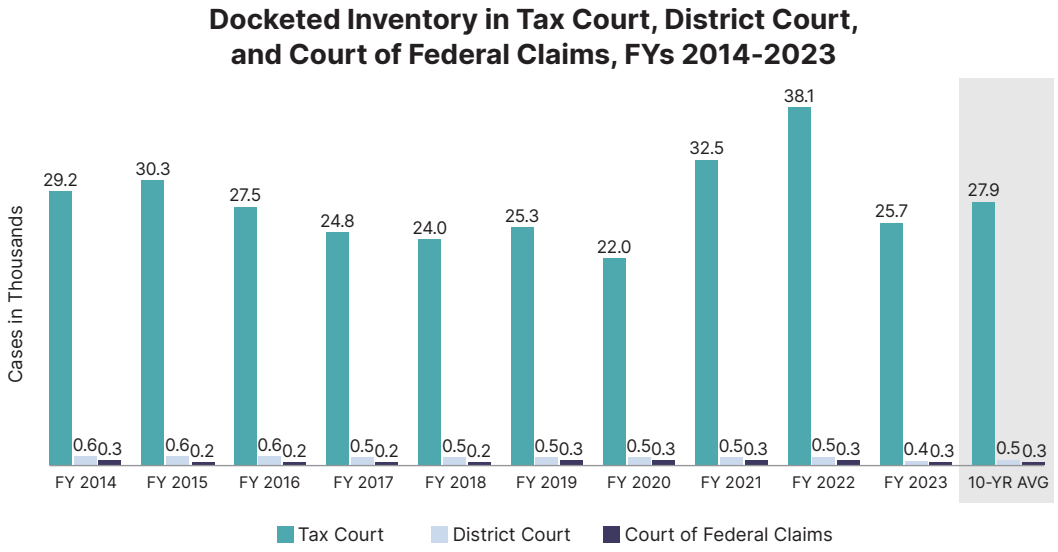
The inventory of docketed cases in all U.S. district courts continued a slight downward trend, and inventory in the Court of Federal Claims remained roughly the same as in prior years. Figure 3.13 compares the number of docketed cases in inventory in the Tax Court, the Court of Federal Claims, and the district courts at the end of the past ten fiscal years and calculates a ten-year average.

89 Data compiled by the IRS Office of Chief Counsel (Oct. 20, 2023); 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. The petition data was provided by Appeals and the IRS Office of Chief Counsel. Data from the IRS Office of Chief 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.

90 Data compiled by the IRS Office of Chief Counsel (Oct. 20, 2023); 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.

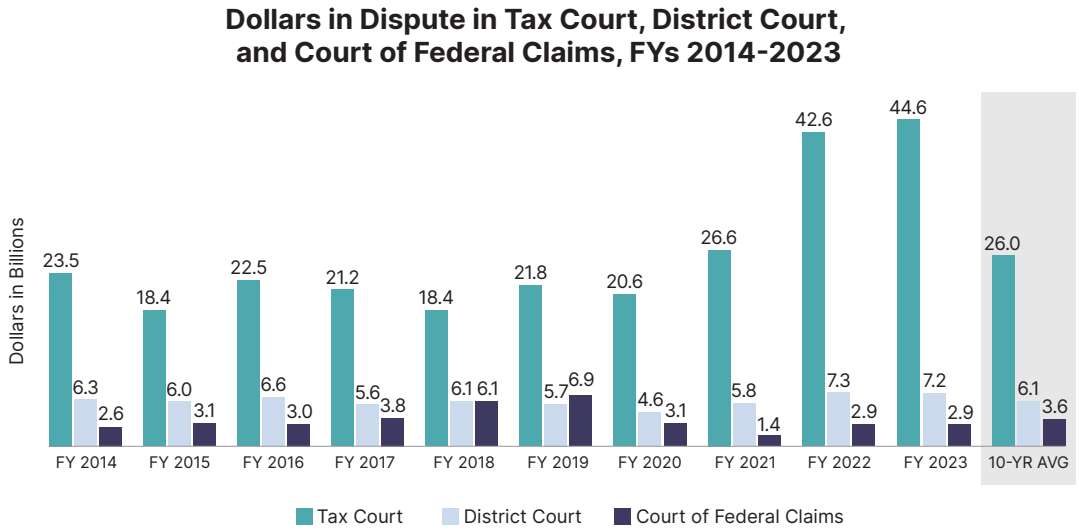
91 *See* National Taxpayer Advocate 2023 Annual Report to Congress (Most Serious Problem: *Appeals*: *Despite Some Improvements, Many Taxpayers and Tax Professionals Continue to Perceive the IRS Independent Office of Appeals as Insufficiently Independent*), *supra*.

FIGURE 3.13[92]



While the Tax Court docket has the overwhelming majority of cases, 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 and 2023, roughly doubling the average in the prior eight years. Amounts at issue in the district courts and Court of Federal Claims remain close to their ten-year averages.[93] Figure 3.14 shows the total yearly dollars in dispute for the docketed case inventory in these courts over the past ten fiscal years.

FIGURE 3.14[94]



92 Data compiled by the IRS Office of Chief Counsel (Oct. 20, 2023); IRS, Counsel Automated Tracking System, TL-708B.
93 Data compiled by the IRS Office of Chief Counsel (Oct. 20, 2023); IRS, Counsel Automated Tracking System, TL-708B.
94 Data compiled by the IRS Office of Chief Counsel (Oct. 20, 2023); 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.

Looking to the pending inventory of Tax Court cases at the end of FY 2023, in nearly 68 percent of the cases, there was less than $50,000 at stake.[95] About two percent of the total docketed Tax Court cases involved an amount in dispute of more than $10 million, but that represents nearly 83 percent of all dollars in dispute in the Tax Court. Figure 3.15 shows the breakdown of FY 2023 Tax Court cases by dollars in dispute.

FIGURE 3.15[96]

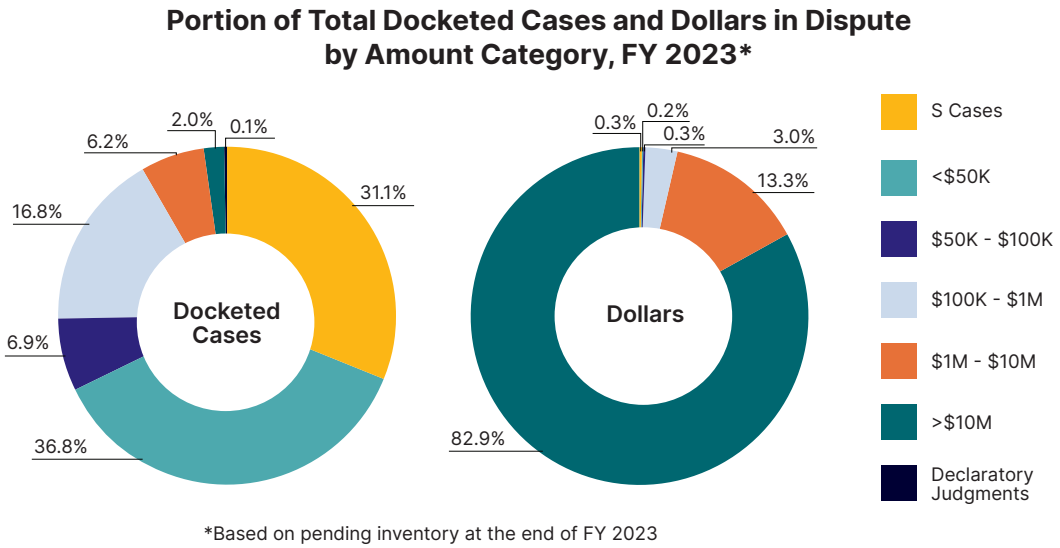
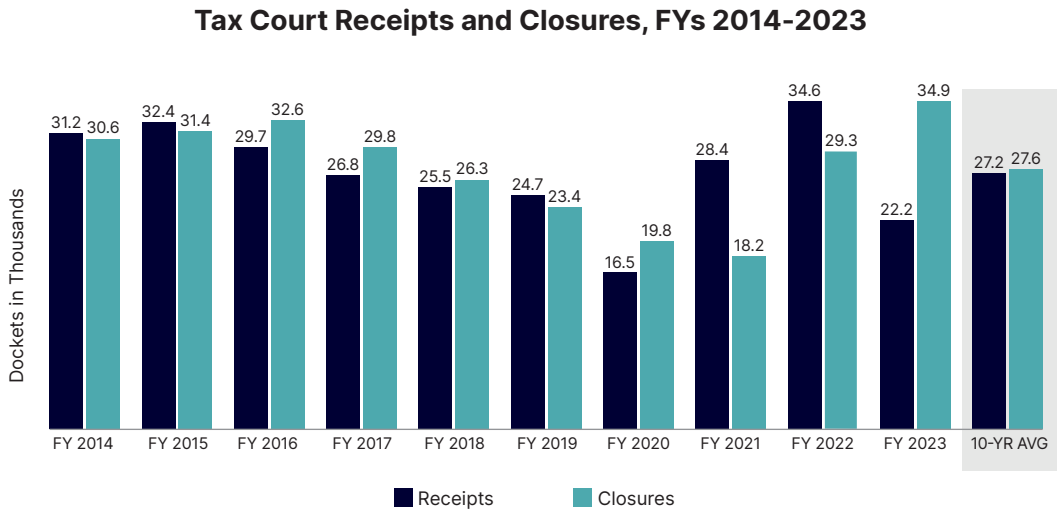


Figure 3.16 shows the Tax Court receipts and closures of cases over a ten-year period. This data shows how receipts fell to all-time lows in FY 2020 but increased in FYs 2021 and 2022. In FY 2023, receipts fell sharply from last year, but closures were at their highest in the ten-year period.

95 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 decision is entered. 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.

96 Data compiled by the IRS Office of Chief Counsel (Oct. 20, 2023); IRS, Counsel Automated Tracking System, TL-711. Inventory pending as of September 30, 2023. Does not include cases on appeal. Totals may not add up to 100 percent because of rounding.

FIGURE 3.16[97]



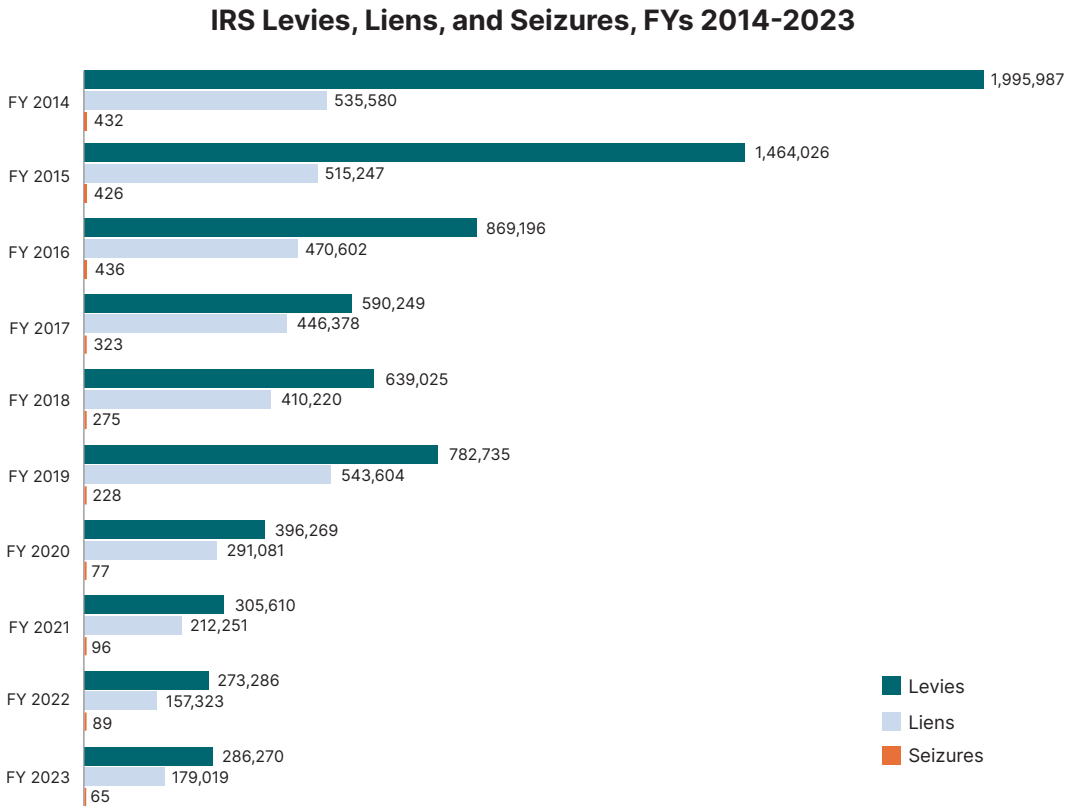
Tax Court cases begin with a taxpayer filing a petition to the Court.[98] However, in a U.S. district court, both taxpayers and the IRS or the DOJ representing the United States can initiate proceedings as part of enforcement actions.

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.[99] The DOJ may bring a civil action to enforce a federal tax lien and to foreclose on taxpayer property, including a personal residence, to satisfy an outstanding tax liability.[100] If the lien is valid, the court will typically issue an order of 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 to sue for a refund.[101] The number of U.S. district court cases has declined on par with the number of Tax Court cases during the last ten years, following a similar decline in IRS collection enforcement actions.

Figure 3.17 shows the number of levies, liens, and seizures during the past ten fiscal years, each of which has experienced a steady decline.

97 Data compiled by the IRS Office of Chief Counsel (Oct. 20, 2023); IRS, Counsel Automated Tracking System, TL-711. Inventory pending as of September 30, 2023. Does not include cases on appeal or declaratory judgments.
98 *See, e.g.*, IRC § 6213 (with respect to deficiency proceedings).
99 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).
100 IRC § 7403.
101 Refund suits will be discussed separately in this section.

FIGURE 3.17[102]



Some of the low numbers in recent years are attributable in part to measures taken during the pandemic with respect to collection efforts, but overall, the downward trend began much earlier, corresponding with a decline in numbers of IRS collection personnel.[103] Levies and liens in FY 2023 both show a slight uptick from FY 2022 but remain well below historic numbers. The number of seizures was at its ten-year low in FY 2020.

102 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 2022, https://www.irs.gov/pub/irs-pdf/p55b.pdf (Table 25 Delinquent Collection Activities, Fiscal Years); IRS, Activity Report 5000-24 (Oct. 12, 2023); IRS, Activity Report 5000-25 (Oct. 4, 2023).

103 *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.

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.[104] The taxpayer generally must fully pay the tax assessed by the IRS prior to bringing the suit.[105] The full payment requirement is a key difference 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.[106]

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.[107] 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.[108] 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.[109] 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.[110] 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.[111]

In her 2022 Report to Congress, the National Taxpayer Advocate identified the Supreme Court's decision in *Boechler v. Commissioner*,[112] which held the 30-day time limit on filing a petition for review of a CDP determination is non-jurisdictional, as a significant case in FY 2022.[113] In FY 2023 refund litigation cases, the Court of Federal Claims and district courts had the opportunity to consider the consequences of *Boechler* and related jurisprudence in the context of whether the IRC § 7422 requirements are jurisdictional. For example, the Court of Federal Claims issued holdings in two cases finding the taxpayer's signature and verification requirement was not jurisdictional based on recent changes in Federal Circuit precedent[114] but also determined in another case that the timely filed refund claim requirement was jurisdictional, as previously decided in prior Federal Circuit case law the court determined was not impacted by *Boechler*.[115] These

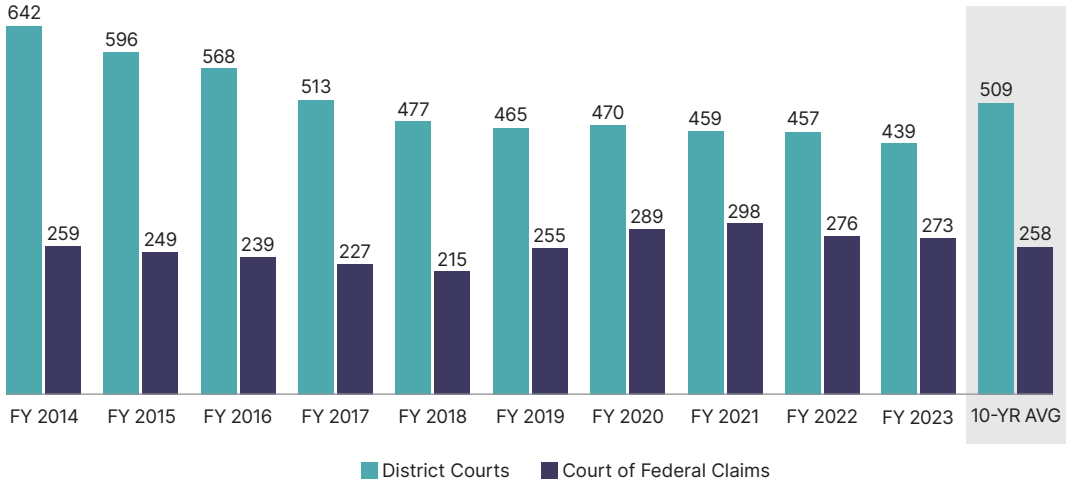
104 IRC § 6532; 28 U.S.C. § 1346(a)(l).
105 *See Flora v. United States*, 362 U.S. 145 (1960).
106 The full payment requirement is unfair to taxpayers as it limits the ability to file suit if they are unable to pay the disputed amount. Equal access to justice should allow taxpayers who cannot pay what 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; National Taxpayer Advocate 2024 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*).
107 IRC §§ 6061(a), 6065; Treas. Reg. §§ 1.6012-1(a)(5), 1.6065-1(a), 301.6402-2(b)(1), (e).
108 IRC § 6511.
109 IRC § 6532(a)(1).
110 *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.
111 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.
112 *Boechler v. Comm'r*, 596 U.S. 199 (2022).
113 National Taxpayer Advocate 2022 Report to Congress 192 (Most Litigated Issues: *Significant Cases*), https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2023/01/ARC22_MostLitigatedIssues.pdf. The *Boechler* decision has put a focus on which IRC provisions are non-jurisdictional, as illustrated by two significant cases identified by the National Taxpayer Advocate this year: *Hallmark Research Collective v. Comm'r* and *Culp v. Comm'r*. *See* Most Litigated Issues: *Significant Cases*, *infra*.
114 *Vensure HR, Inc. v. United States*, 164 Fed. Cl. 276 (Fed. Cl. 2023); *Cooper v. United States*, 165 Fed. Cl. 531 (Fed. Cl. 2023).
115 *Polk v. United States*, 167 Fed. Cl. 731 (Fed. Cl. 2023).

FY 2023 cases highlight the evolving landscape for taxpayers regarding the question of whether IRC § 7422 requirements are jurisdictional, which will be an ongoing issue for taxpayers as the question continues to be litigated.[116]

As shown in Figure 3.18, in FY 2023, 712 refund cases remained in inventory, down slightly from 733, the FY 2022 total. The U.S. district courts presided over 439 of these cases, while 273 went before the U.S. Court of Federal Claims.[117]

FIGURE 3.18[118]

Tax Refund Case Inventory Before the District Courts and Court of Federal Claims, FYs 2014-2023



CRIMINAL TAX VIOLATIONS

Tax administration has long been a target for criminal activity, which the IRS combats with its Criminal Investigation (CI) Division that includes approximately 2,100 special agents deployed globally.[119] The special agents of IRS CI have federal investigative jurisdiction over various financial crimes, including complex fraud and money laundering schemes, but only IRS CI has federal jurisdiction to investigate potential criminal tax violations of the IRC.[120] IRS CI refers its criminal investigations to the DOJ for prosecution.[121]

116 *See, e.g.*, Carlton M. Smith, *Courts Differ on Curing Jurisdictional Defects in Refund Suits After Filing*, PROCEDURALLY TAXING (Oct. 6, 2023), https://www.taxnotes.com/procedurally-taxing/courts-differ-curing-jurisdictional-defects-refund-suits-after-filing/2023/10/06/7hf1k?highlight=7422; Carlton M. Smith, *DOJ Wins One Case and Loses Motions in Another Where POAs Signed First Refund Claims for Taxpayers, Part II*, PROCEDURALLY TAXING (May 26, 2023), https://www.taxnotes.com/procedurally-taxing/doj-wins-one-case-and-loses-motions-another-where-poas-signed-first-refund-claims-taxpayers-part-ii/2023/05/26/7h5ts?highlight=7422; Keith Fogg, *Circuit Precedent and Supreme Court Decisions*, PROCEDURALLY TAXING (Feb. 20, 2023), https://www.taxnotes.com/procedurally-taxing/circuit-precedent-and-supreme-court-decisions/2023/02/20/7h6m7?highlight=7422.

117 Data compiled by the IRS Office of Chief Counsel (Oct. 20, 2023); IRS, Counsel Automated Tracking System, TL-712. Does not include cases on appeal or declaratory judgments.

118 Data compiled by the IRS Office of Chief Counsel (Oct. 20, 2023); IRS, Counsel Automated Tracking System, TL-712. Does not include cases on appeal or declaratory judgments.

119 IRS, Criminal Investigation (CI) At-a-Glance (last updated Mar. 29, 2023), https://www.irs.gov/about-irs/criminal-investigation-ci-at-a-glance.

120 *Id.*

121 *Id.*

During FY 2023, IRS CI initiated 2,676 investigations, referred 1,838 cases to the DOJ for prosecution, and aided in securing 1,508 convictions, with an 88.4 percent overall rate of conviction.[122] The work of IRS CI resulted in $272 million in seizures and identification of $5.5 billion in tax fraud and $31.6 billion in other financial crimes in FY 2023.[123]

According to U.S. Courts' Federal Judiciary Caseload Statistics, there was about a ten percent decrease in criminal tax fraud cases commenced in federal district courts in FY 2023 compared to FY 2022, with 342 and 381 cases per year, respectively.[124] A total of 387 criminal tax fraud defendants appeared in U.S. district courts in FY 2023, with 345 who pled guilty and another 17 criminally convicted or sentenced after a bench or jury trial.[125] For comparison, in 2022, 370 of criminal tax fraud defendants pled guilty, and 12 were convicted or sentenced via a bench or jury trial.[126]

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.[127]
- 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).[128]
- 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.[129]
- 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

122 IRS, Pub. 3583, Internal Revenue Service: Criminal Investigation Annual Report (Dec. 2023), https://www.irs.gov/pub/irs-pdf/p3583.pdf.
123 *Id.*
124 U.S. Courts' 2023 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, 2022, and March 31, 2023, https://www.uscourts.gov/statistics/table/d-2/federal-judicial-caseload-statistics/2023/03/31.
125 U.S. Courts' 2023 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, 2022, and March 31, 2023, https://www.uscourts.gov/statistics/table/d-4/federal-judicial-caseload-statistics/2023/03/31.
126 U.S. Courts' 2023 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, 2022, and March 31, 2023, https://www.uscourts.gov/statistics/table/d-4/federal-judicial-caseload-statistics/2023/03/31.
127 For further discussion, see National Taxpayer Advocate 2024 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*).
128 For further discussion, see National Taxpayer Advocate 2024 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)*).
129 For further discussion, see National Taxpayer Advocate 2024 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*).

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.[130]

- Amend IRC § 6532(a) to remove subsection (a)(4) and to 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 1) the standard two-year period provided in IRC § 6532(a)(1), or 2) six months after the date of the Appeals closing letter.[131]
- Amend IRC § 7403 to preclude IRS employees from requesting that the 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 employee 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 a 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, the taxpayer's former spouse, or the taxpayer's 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.[132]
- 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.[133]
- 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.[134]

130 For further discussion, see National Taxpayer Advocate 2024 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.

131 For further discussion, see National Taxpayer Advocate 2024 Purple Book, *Compilation of Legislative Recommendations to Strengthen Taxpayer Rights and Improve Tax Administration* (*Extend the Deadline for Taxpayers to Bring a Refund Suit When They Have Requested Appeals Reconsideration of a Notice of Claim Disallowance But the IRS Has Not Acted Timely to Decide 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, our recommendation could be modified to provide that an extension beyond two years will only be permitted for the first refund claim filed for a tax period.

132 For further discussion, see National Taxpayer Advocate 2024 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).

133 For further discussion, see National Taxpayer Advocate 2024 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*).

134 For further discussion, see National Taxpayer Advocate 2024 Purple Book, *Compilation of Legislative Recommendations to Strengthen Taxpayer Rights and Improve Tax Administration* (*Provide That "an Opportunity to Dispute" an Underlying Liability Means an Opportunity to Dispute Such Liability in the U.S. Tax Court*).

- Amend IRC § 6212 to require the IRS to issue a statutory notice before assessing any "assessable penalty" or other international information return (IIR) penalty listed in Chapter 61, Subchapter A, Part III, Subpart A.[135]
- Amend IRC § 6402 to require the IRS to act on refund claims within three years. Failure to take timely action on a refund claim would result in an additional five percent interest on top of the IRC § 6621 rate, and in the event of litigation, the burden of proof would shift to the Secretary.[136]
- Amend IRC §§ 6320(a)(3)(B), 6330(a)(3)(B), and 6330(d)(1) to allow 90 days (*i.e.*, an additional 60 days) in which to request a CDP hearing after the issuance of a CDP lien or levy notice and in which to file a petition in the U.S. Tax Court to request a hearing after the issuance of a notice of determination if the notice is addressed to a person outside the United States.[137]

SIGNIFICANT CASES

This section describes cases decided in FY 2023 that involve issues of general importance to federal tax administration.[138]

Tax Court Holds Filing Deadlines Are Jurisdictional for Tax Deficiency Cases

In *Hallmark Research Collective v. Commissioner*, a California-based marijuana dispensary filed a Tax Court petition challenging several IRS deficiency notices.[139] These notices disallowed business deductions under IRC § 280E, which pertains to businesses involved in the trafficking of controlled substances.[140] Due to its accountant's illness, the taxpayer filed the Tax Court petition one day late, missing the 90-day deadline set by IRC § 6213(a). The Tax Court dismissed the case for lack of jurisdiction on April 1, 2022.

Subsequently, the U.S. Supreme Court ruled in *Boechler v. Commissioner* that the 30-day period for filing a petition seeking Tax Court review of a collection determination under IRC § 6330(d)(1) is not jurisdictional and is subject to equitable tolling, which allows for exceptions to late filing based on good cause.[141] *Hallmark* filed a motion to vacate the previous Tax Court dismissal based on *Boechler*, arguing IRC §§ 6213(a) and 6330(d)(1) are functionally the same.

The Tax Court disagreed. Instead, it held the language and context of IRC § 6213(a) clearly indicated that the deadline for filing a deficiency case is jurisdictional. The court also cited historical amendments to IRC §§ 6213(a) and 7459(d) as evidence supporting the jurisdictional nature of the deadline.

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135 For further discussion, see National Taxpayer Advocate 2024 Purple Book, *Compilation of Legislative Recommendations to Strengthen Taxpayer Rights and Improve Tax Administration* (*Provide That Assessable Penalties Are Subject to Deficiency Procedures*).

136 For further discussion, see National Taxpayer Advocate 2024 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*).

137 For further discussion, see National Taxpayer Advocate 2024 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 U.S. Tax Court*).

138 When identifying the ten most litigated issues, TAS analyzed federal decisions issued during the fiscal year period beginning on October 1, 2022, through September 30, 2023. For purposes of this section, we used the same period.

139 159 T.C. No. 6 (Nov. 29, 2022).

140 *See generally* Erin M. Collins, Despite Operating Legally in Many States, Marijuana-Related Businesses Face Significant Federal Income Tax Law Challenges, NATIONAL TAXPAYER ADVOCATE BLOG (May 10, 2022), https://www.taxpayeradvocate.irs.gov/news/nta-blog-despite-operating-legally-in-many-states-marijuana-related-businesses-face-significant-federal-income-tax-law-challenges/.

141 *Boechler P.C. v. Comm'r*, 596 U.S. 199 (2022). *See also* National Taxpayer Advocate 2022 Annual Report to Congress 192, 193 (Most Litigated Issues: *Significant Cases*), https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2023/01/ARC22_MostLitigatedIssues.pdf.

The *Hallmark* case has significant implications for taxpayers, particularly concerning their *right to challenge the IRS's position and be heard*, as outlined in the Taxpayer Bill of Rights.[142] The Tax Court's decision to uphold the jurisdictional nature of the filing deadline under IRC § 6213(a) limits the scope for equitable tolling. This could potentially affect taxpayers who, for valid reasons, are unable to meet the strict filing deadlines, thereby affecting a taxpayer's *right to a fair and just tax system*.[143]

The *Hallmark* decision is likely to impact how the Tax Court and appellate courts interpret the jurisdictional nature of filing deadlines in tax cases.[144] It sets a precedent that could limit the applicability of equitable tolling in future cases, affecting the taxpayer's ability to challenge IRS determinations. This decision is also expected to trigger further litigation in circuit courts[145] and possibly another Supreme Court review given its apparent divergence from the *Boechler* ruling.

Third Circuit Holds Filing Deadlines Are Not Jurisdictional for Tax Deficiency Cases

In contrast to *Hallmark Research Collective*, the Third Circuit in *Culp v. Commissioner* upset the Tax Court's view on its jurisdiction related to the timeliness of taxpayer petitions in tax deficiency cases.[146] The Tax Court had maintained for almost 100 years that if a petition arrives late, the court lacks jurisdiction to hear the case, regardless of the reason for the delay. In *Culp*, the Third Circuit decided the tax deficiency filing deadline is not jurisdictional and is subject to equitable tolling, which allows for exceptions based on good cause.

The taxpayers in this case, retired employment discrimination attorneys, filed a late Tax Court petition disputing an IRS determination that they owed a tax year 2015 tax deficiency, arguing they never received the original notice of deficiency. The Tax Court dismissed their petition for lack of jurisdiction, prompting an appeal to the Third Circuit.

The Third Circuit panel unanimously reversed the Tax Court's decision, holding that the controlling statute must clearly state Congress intended for a time limit to create a jurisdictional barrier. The Third Circuit found the nearly century-old statute in question did not make such a clear statement and therefore applied the presumption of equitable tolling in deficiency cases.

This case is significant for several reasons. First, it potentially opens the doors of the Tax Court to approximately 600 taxpayers each year who file late.[147] This is particularly significant for unrepresented taxpayers, who make up most late filers.[148] Not all late filers will come in, as only those within the Third Circuit's appellate jurisdiction[149] with a valid reason for the delay can currently present the merits of their case without having to first pay the tax and sue for a refund in another federal court. Those outside the Third Circuit's appellate jurisdiction still cannot. This latter point is bolstered by the Tax Court's recent reaffirmation of its *Hallmark* decision, maintaining that a tax deficiency filing deadline is jurisdictional.[150]

142 IRC § 7803(a)(3)(D).
143 IRC § 7803(a)(3)(J).
144 On November 2, 2023, the Tax Court reaffirmed its position that tax deficiency filing deadlines are jurisdictional in *Sanders v. Comm'r*, 161 T.C. No. 8 (Nov. 2, 2023).
145 The Third Circuit has already ruled contrary to the Tax Court's *Hallmark* decision, finding timely filing non-jurisdictional in tax deficiency cases. *See Culp v. Comm'r*, 75 F.4th 196 (3d Cir. 2023), *infra*.
146 75 F.4th 196 (3d Cir. 2023).
147 Keith Fogg, *Opening the Tax Court's Doors,* Procedurally Taxing (Sept. 11, 2023), https://www.taxnotes.com/tax-notes-today-federal/litigation-and-appeals/opening-tax-courts-doors/2023/09/11/7h8bt.
148 *Id*.
149 According to the *Golsen* rule, *Culp* sets a precedent for the Tax Court in cases within the Third Circuit's appellate jurisdiction. *Golsen v. Comm'r,* 54 T.C. 742 (1970), *aff'd on other grounds*, 445 F.2d 985 (10th Cir. 1971). Thus, taxpayers with rights to appeal to the Third Circuit can argue for an extended petition deadline due to exceptional circumstances even if the filing is late. However, this rule is not universally binding and does not impact Tax Court cases in other jurisdictions.
150 *Sanders v. Comm'r*, 161 T.C. No. 8 (Nov. 2, 2023).

Second, the decision ensures more flexible consideration of the timeliness issue for those within the Third Circuit's appellate jurisdiction, safeguarding the taxpayers' *rights to challenge the IRS's position and be heard*[151] and *to a fair and just tax system*.[152]

Because it challenges the Tax Court's traditional stance on jurisdiction and timeliness, *Culp* will potentially have a far-reaching impact for future tax cases involving equitable tolling arguments. This will require IRS attorneys to review taxpayer petitions more vigilantly and could lead to more Tax Court hearings on the validity of excuses for the late filing of a petition.

Yet, the issue is far from settled. On October 3, 2023, the government filed a petition for rehearing *en banc*,[153] arguing the Third Circuit panel decision contradicts a century of case law[154] and obliterates the careful balance Congress struck between prepayment review in the Tax Court and post-payment refund suits in the district courts and Court of Federal Claims.[155] The Third Circuit sustained the panel's decision.[156] However, future litigation is likely before the issue is settled for all taxpayers.[157] Therefore, judicial clarification is still needed. Congress can avert future litigation by considering legislation that clarifies the jurisdictional nature of filing deadlines in tax cases, thereby providing more certainty to courts, taxpayers, and the IRS.

The IRS Is Not Authorized to Assess and Collect Penalties Under IRC § 6038(b) for Failure to File Certain International Information Returns

In *Farhy v. Commissioner*,[158] the taxpayer challenged the IRS's authority to assess and collect IIR penalties for the failure to file Form 5471, Information Return of U.S. Persons With Respect to Certain Foreign Corporations.[159] The taxpayer had a reporting requirement under IRC § 6038(a) to report his ownership interests in two foreign corporations but failed to file the required Forms 5471 for multiple tax years. The IRS assessed an initial penalty under IRC § 6038(b)(1) for each year and continuation penalties under IRC § 6038(b)(2). The IRS sought to collect the penalties via levy, and the taxpayer timely filed a CDP petition with the Tax Court.

The taxpayer argued that, unlike many other penalty provisions in the tax code, IRC § 6038 has no language authorizing assessment of the penalty it imposes. In addition, the taxpayer argued that because this IRC section falls outside of the sections in Subchapter B of Chapter 68 of Subtitle F, which is entitled *Assessable Penalties*, and because it has no language linking its penalty provision to any other authorization to assess and collect penalties, the IRS does not have authority to assess and collect this penalty.

151 IRC § 7803(a)(3)(D).
152 IRC § 7803(a)(3)(J).
153 *Culp v. Comm'r*, No. 22-1789 (3d Cir. filed Oct. 3, 2023) (petition for rehearing *en banc*).
154 On appeal, the IRS argues the Tax Court "is a court of limited jurisdiction," *Comm'r v. McCoy*, 484 U.S. 3, 7 (1987) (*per curiam*), which "possess[es] only such jurisdiction as is expressly conferred by Congress." *Sunoco Inc. v. Comm'r*, 663 F.3d 181, 187 (3d Cir. 2011).
155 *Sunoco*, 663 F.3d at 187 ("The Tax Court's principal basis for jurisdiction is I.R.C. § 6213(a). That section of the Tax Code gives the Tax Court jurisdiction to redetermine a 'deficiency' in income, estate, gift, and certain excise taxes as to which the IRS has issued a notice of deficiency pursuant to I.R.C. § 6212(a).").
156 *Culp v. Comm'r*, 75 F.4th 196 (3d Cir.), *reh'g denied*, No. 22-1789 (3d Cir. Nov. 28, 2023).
157 *See* Mary Katherine Browne, *Third Circuit Rejects Rehearing on Equitable Tolling in* Culp, Tax Notes, Nov. 29, 2023, https://www.taxnotes.com/tax-notes-today-federal/litigation-and-appeals/third-circuit-rejects-rehearing-equitable-tolling-culp/2023/11/29/7hlkr. For examples of cases in other circuit jurisdictions arguing against the *Hallmark* holding that timely filing in tax deficiency matters is jurisdictional for the Tax Court, see *Nutt v. Comm'r*, 160 T.C. No. 10 (May 3, 2023), *appeal filed*, Notice of Appeal, No. 15959-22 (11th Cir., Aug. 1, 2023); *Sanders v. Comm'r*, 161 T.C. No. 8 (Nov. 2, 2023); *Evenhouse v. Comm'r*, T.C. Memo. 2023-113.
158 160 T.C. No. 6 (Apr. 3, 2023).
159 IRS, Form 5471, Information Return of U.S. Persons With Respect to Certain Foreign Corporations, https://www.irs.gov/pub/irs-pdf/f5471.pdf.

The IRS raised several arguments in favor of its contrary position. The primary contention was that the term "assessable penalties" refers to any penalty in the IRC not subject to deficiency procedures and that no IRC section limits the term "assessable penalties" to those found within Subchapter B of Chapter 68. The IRS also contended that the definition of "taxes," which includes "assessable penalties," in IRC § 6201 is broad enough to encompass IRC § 6038(b) penalties.

The Tax Court found the taxpayer's arguments correct, holding that the IRS may not proceed with the collection of IRC § 6038(b) penalties from the taxpayer via the proposed levy because the IRS did not have the statutory authority to assess these penalties.

Farhy has significant implications for taxpayers with international financial interests, and the court held the IRS lacks statutory authority to make IRC § 6038(b) penalty assessments.

The National Taxpayer Advocate previously identified the assessment of international penalties under IRC §§ 6038 and 6038A as a Most Serious Problem, deeming these assessments "legally unsupportable" and overly burdensome for the IRS and taxpayers.[160] The National Taxpayer Advocate also warned of future litigation in this area and recommended legislative changes to provide clarity.[161]

Farhy could open the door for litigation involving additional forms, related penalties,[162] and other non-international penalty sections that do not explicitly provide the IRS with assessment authority. The decision might also affect taxpayers subject to related penalties under other sections of the tax code, such as IRC § 6038A(d).

The case also underscores the need for legislative clarification regarding IIR penalties. The National Taxpayer Advocate renews her previous recommendation that Congress treat all IIR penalties as subject to deficiency procedures.[163] This means taxpayers would receive a formal statutory notice and an opportunity to dispute the penalties in Tax Court. The legislative change will create a more fair and just tax system[164] because it allows all taxpayers to argue their case in court without having to first pay the penalties and then sue for a refund. For the first time, lower- and middle-income taxpayers would have access to the same due process afforded more affluent taxpayers in the context of IIR penalties. The change will also encourage the IRS to assess these penalties more carefully, knowing more taxpayers can challenge them without the sometimes-crippling cost of prepayment.

160 National Taxpayer Advocate 2020 Annual Report to Congress 119 (Most Serious Problem: *International*: *The IRS's Assessment of International Penalties Under IRC §§ 6038 and 6038A Is Not Supported by Statute, and Systemic Assessments Burden Both Taxpayers and the IRS*), https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2021/01/ARC20_MSP_08_International.pdf; Erin M. Collins, International Information Return Penalties Impact a Broad Range of Taxpayers, National Taxpayer Advocate Blog (Aug. 22, 2023), https://www.taxpayeradvocate.irs.gov/news/nta-blog-international-information-return-penalties/.

161 National Taxpayer Advocate 2020 Annual Report to Congress 119 (Most Serious Problem: *International*: *The IRS's Assessment of International Penalties Under IRC §§ 6038 and 6038A Is Not Supported by Statute, and Systemic Assessments Burden Both Taxpayers and the IRS*), https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2021/01/ARC20_MSP_08_International.pdf; Erin M. Collins, International Information Return Penalties Impact a Broad Range of Taxpayers, National Taxpayer Advocate Blog (Aug. 22, 2023), https://www.taxpayeradvocate.irs.gov/news/nta-blog-international-information-return-penalties/.

162 *See, e.g.*, IRS, Form 5472, Information Return of a 25% Foreign-Owned U.S. Corporation or a Foreign Corporation Engaged in a U.S. Trade or Business, https://www.irs.gov/pub/irs-pdf/f5472.pdf; IRS, Form 926, Return by a U.S. Transferor of Property to a Foreign Corporation, https://www.irs.gov/pub/irs-pdf/f926.pdf; IRS, Form 8865, Return of U.S. Persons With Respect to Certain Foreign Partnerships, https://www.irs.gov/pub/irs-pdf/f8865.pdf; and IRS, Form 8938, Statement of Specified Foreign Financial Assets, https://www.irs.gov/pub/irs-pdf/f8938.pdf.

163 National Taxpayer Advocate 2020 Annual Report to Congress 119 (Most Serious Problem: *International*: *The IRS's Assessment of International Penalties Under IRC §§ 6038 and 6038A Is Not Supported by Statute, and Systemic Assessments Burden Both Taxpayers and the IRS*), https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2021/01/ARC20_MSP_08_International.pdf.

164 *See* IRC § 7803(a)(3)(J).

Per *Bittner*, the $10,000 Report of Foreign Bank and Financial Accounting Penalty Is Per Form, Not Per Bank Account

The U.S. Supreme Court case *Bittner v. United States* involved the interpretation of penalties for non-willful violations of the Report of Foreign Bank and Financial Accounting (FBAR) under the Bank Secrecy Act (BSA).[165] The BSA requires U.S. citizens to annually disclose their foreign account financial interests, with a penalty of up to $10,000 for a non-willful failure to do so.[166] The taxpayer, a dual citizen of Romania and the United States, failed to file FBARs for his interests in multiple foreign accounts. As a result, the government imposed a $2.72 million penalty, calculating the penalty on a per-account basis. The taxpayer argued the $10,000 penalty should apply per reporting form, not per account. The case reached the Supreme Court after conflicting opinions from the Fifth and Ninth Circuits.[167]

In a five-to-four decision, the Supreme Court sided with the taxpayer, holding the penalty for non-willful FBAR violations applies per reporting form, not per account, because the statutory language of the BSA, along with IRS and Treasury publications, support a per-form approach. The dissent argued the statute naturally reads to apply penalties per account.

The case has significant implications for taxpayers with foreign bank accounts and directly impacts several taxpayer rights. First, the opinion ensures taxpayers are not excessively penalized, aligning with the *right to pay no more than the correct amount of tax*.[168] Second, the decision clarifies the penalty structure, informing taxpayers of their obligations under the law.[169] Third, the ruling resolves ambiguity in FBAR penalty calculations, thereby promoting the *right to a fair and just tax system*.[170]

Bittner serves as a check on the IRS's discretion and curtails agency overreach. The IRS has already updated its procedures for examining FBAR reporting in line with the *Bittner* decision, indicating immediate changes in enforcement and appeals procedures for non-willful FBAR violations.[171]

The United States Supreme Court Upholds Third-Party Summons Notification Exception

In *Polselli v. IRS*, the Supreme Court ruled unanimously that the IRS is permitted to access third-party records without notifying the third parties when looking for assets to cover unpaid taxes, even if the taxpayer has no legal claim over the records and accounts summoned.[172] The IRS sought to collect over $2 million in taxes owed by the taxpayer. To aid in this collection, the IRS issued summonses for the bank records of the taxpayer's wife and the taxpayer's lawyers. The IRS gave neither the wife nor the lawyers notice of these summonses, and they subsequently filed motions to quash the summonses. The district court dismissed these motions for lack of subject matter jurisdiction, and the Sixth Circuit affirmed.

165 598 U.S. 85 (2023).
166 31 U.S.C. § 5321(a)(5)(A), (B).
167 *United States v. Bittner*, 19 F.4th 734 (5th Cir. 2021) (holding the $10,000 FBAR penalty applies per account, not per reporting form); *United States v. Boyd*, 991 F.3d 1077 (9th Cir. 2021) (holding the penalty applies per reporting form, no matter the number of accounts).
168 IRC § 7803(a)(3)(C).
169 IRC § 7803(a)(3)(A).
170 IRC § 7803(a)(3)(J).
171 Interim Guidance Memo (IGM) SBSE-04-0723-0034, Interim Guidance on FBAR Examination Case Procedures Due to Supreme Court Decision (*Bittner v. US*) (July 6, 2023), https://www.irs.gov/pub/foia/ig/sbse/sbse-04-0723-0034-redacted.pdf; IGM, FBAR Case Procedures Due to the *Bittner v. United States* Supreme Court Decision, AP-08-0923-0010 (Sept. 26, 2023), https://www.irs.gov/pub/foia/ig/spder/ap-08-0923-0010-redacted.pdf.
172 598 U.S. 432 (2023).

The principal issue was the interpretation of IRC § 7609(c)(2)(D)(i), which provides an exception to the general rule that the IRS must notify third parties when their records are summoned. The petitioners argued the exception should only apply if the delinquent taxpayer has a legal interest in the summoned records.[173] The Supreme Court unanimously rejected this interpretation, holding that the statute does not mention any requirement for a legal interest.

Highlighting the adjacent IRC § 7610(b)(1), which emphasizes a taxpayer's "proprietary interest," the Court noted that this omission in IRC § 7609 was deliberate. Although the Court broadly interpreted the phrase "in aid of … collection" in the statute, which allows for an exception to notifying third parties, it did not explicitly define these boundaries.[174] A concurring opinion stressed vigilance in applying this exception to ensure taxpayer rights are not unduly compromised.

This ruling streamlines the IRS's ability to collect unpaid taxes; however, it also raises concerns about taxpayer rights, particularly the *rights to privacy*[175] and *to be informed*,[176] especially for individuals who are not directly involved in the underlying tax delinquency case.

The Court's decision leaves open questions about the precise boundaries of the IRS's power under IRC § 7609. While the ruling is narrow, it sets a precedent that can be cited in future cases involving IRS summonses and third-party records. Given the potential impact on taxpayer rights, particularly the *rights to privacy* and *to be informed*, Congress should review this statute to ensure it provides clear guidance on when and to whom third-party notice is required concerning IRS summonses.

Litigation Trend: Challenges Concerning the Administrative Procedure Act

The increase in litigation challenging IRS notices under the Administrative Procedure Act (APA)[177] is a notable development for tax administration. Cases in FY 2023 continue the trend established in previous years, especially for cases challenging IRS notices concerning micro-captive insurance transactions[178] and syndicated conservation easement charitable deductions.[179] This trend is evidence of increased judicial scrutiny of the IRS's adherence to APA procedures when issuing notices with the force of law.[180]

For FY 2023, both *Green Valley Investors, LLC v. Commissioner*[181] and *Green Rock, LLC v. IRS*[182] involved taxpayer challenges to Notice 2017-10, which identified certain syndicated conservation easement transactions as "listed transactions" requiring disclosure.[183] The courts in both cases relied heavily on the Sixth Circuit's reasoning in last year's decision, *Mann Construction, Inc. v. United States*,[184] which found the IRS had issued a

173 Specifically, IRC § 7609(c)(2)(D)(i) provides an exception for notice of a summons "issued in aid of the collection of an assessment made or judgment rendered against the person with respect to whose liability the summons is issued."
174 IRC § 7609(c)(2)(D).
175 IRC § 7803(a)(3)(G).
176 IRC § 7803(a)(3)(A).
177 5 U.S.C. §§ 551, 553-59, 701-06.
178 *See*, *e.g.*, IRS Notice 2016-66, 2016-47 I.R.B. 745, Transaction of Interest – Section 831(b) Micro-Captive Transactions, challenged in *CIC Servs., LLC v. IRS*, 141 S.Ct. 1582 (2021).
179 *See*, *e.g.*, IRS Notice 2017-10, 2017-4 I.R.B. 544, Syndicated Conservation Easement Transactions as Tax Avoidance Transactions, challenged in *Green Valley Invs., LLC v. Comm'r*, 159 T.C. No. 5 (Nov. 9, 2022) and *Green Rock LLC v. IRS*, 654 F.Supp.3d 1249 (N.D. Ala. 2023). *See also* SECURE 2.0 Act of 2022, enacted as Division T of the Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, 136 Stat. 4459 § 605 (Dec. 29, 2022).
180 Regulations and notices with the force of law are typically categorized as "legislative," as opposed to merely "interpretative" rules. Legislative rules require APA notice-and-comment rulemaking. *See Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96 (2015).
181 159 T.C. No. 5 (Nov. 9, 2022).
182 654 F.Supp.3d 1249 (N.D. Ala. 2023).
183 IRC §§ 6011(a) and 6111(a) permit the IRS to make regulations requiring disclosures of certain information with a tax return.
184 27 F.4th 1138 (6th Cir. 2022) (invalidating the IRS's enforcement of IRS Notice 2007-83, which required the reporting of transactions involving cash-value life insurance policies connected to employee benefit plans, for failure to follow notice-and-comment procedures required by the APA for legislative rules).

similar notice without following the APA's notice-and-comment rulemaking process.[185] The courts in *Green Valley Investors* and *Green Rock* held the IRS's issuance of the Notice 2017-10 without following notice-and-comment rulemaking violated the APA's procedural requirements, leading to the setting aside of the notice.

In *Govig & Associates, Inc. v. United States*,[186] the taxpayers similarly argued the IRS failed to follow required notice-and-comment rulemaking when issuing Notice 2007-83. The court found this procedural challenge time barred as the taxpayers did not bring the claim within six years of the notice's *issuance* in 2007. However, the substantive claim that the IRS exceeded its statutory authority in issuing the notice was not time-barred because the IRS's *application* of the notice to the taxpayer didn't occur until 2019.

The trend represented by these cases should alert the IRS of its need to adhere more rigorously to the APA when issuing guidance that has the force of law. It reflects the ongoing tension between tax enforcement and regulatory compliance, underscoring the need for the IRS to strictly adhere to legal and procedural standards in its administrative actions. The trend also illustrates the evolving nature of tax administration, particularly in areas like conservation easements and micro-captive transactions, where IRS interpretations and enforcement practices continue to develop under increased judicial scrutiny that upholds procedural safeguards to ensure fairness and compliance with APA mandates.

Additionally, the trend impacts taxpayer rights. Taxpayers are entitled to fair warning of potential changes to laws and IRS procedures that carry the force of law. They are also entitled to comment on those changes.[187] The increase in APA litigation emphasizes the importance of the IRS adhering to proper procedures, particularly the notice-and-comment requirement, which directly relates to adequately informing taxpayers of proposed changes to the law and giving them an opportunity to provide input on rules that affect them.[188] Also, taxpayers have a right to prompt, courteous, and professional assistance from the IRS.[189] The litigation trend spotlights instances where the IRS did not fully comply with procedural requirements, potentially affecting the quality of service it provides to taxpayers. Lastly, the emphasis on procedural correctness and fairness aligns with a taxpayer's *right to a fair and just tax system*,[190] one in which the IRS must play by the rules established by Congress.

185 See 5 U.S.C. § 553 for notice-and-comment rulemaking processes.
186 No. CV-22-00579-PHX-DGC (D. Ariz. Mar. 22, 2023).
187 IRC § 7803(a)(3)(A). *Cf. Mann Construction, Inc. v. United States*, 27 F.4th 1138, 1142 (6th Cir. 2022), *quoting Azar v. Allina Health Servs.*, 139 S.Ct. 1804, 1816 (2019) ("Notice and comment gives affected parties fair warning of potential changes in the law and an opportunity to be heard on those changes.").
188 After *Mann Construction* and *Green Valley Investors* set aside IRS Notice 2017-10 for failure to comply with the notice-and-comment rulemaking of the APA, the IRS published a notice of proposed rulemaking (REG-106134-22) in the *Federal Register* (87 FR 75185) proposing regulations that identify certain syndicated conservation easement transactions and substantially similar transactions as listed transactions for purposes of Treas. Reg. § 1.6011-4(b)(2) and IRC §§ 6111 and 6112. A public hearing was held by teleconference on March 1, 2023.
189 IRC § 7803(a)(3)(B).
190 IRC § 7803(a)(3)(J).