

PRACTICE AND PROCEDURE IN THE U.S. TAX COURT

By
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Civic Research Institute

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Preface

Other treatises focus on all forms of tax litigation, on all tax practice, or on representation of clients. Each has its place. This book differs from these other treatises by focusing on guiding the reader only through the procedural maze of the U.S. Tax Court.

The Tax Court holds a unique place in our legal system and in our system of tax litigation. As frequent practitioners in the tax controversy arena know, tax controversies offer taxpayers an array of choices regarding where to litigate a tax case: the U.S. Tax Court, the U.S. district courts, and the U.S. Court of Federal Claims. However, once the decision of where to litigate is made, the differences in procedure can be very dramatic. As those who are familiar with more than one venue well know, differences in procedure can well mean differences in result. Practitioners in the U.S. district courts are all familiar with the Federal Rules of Civil Procedure and the Federal Rules of Evidence. Most tax cases, however, involve petitions to the Tax Court, which has its own procedural rules that are used alongside the Federal Rules of Evidence. This book is designed to help both the practitioner who appears frequently in the Tax Court as well as the newcomer with a first petition in the Tax Court.

This book will help the practitioner navigate the Tax Court Rules of Practice and Procedure, from the time the taxpayer receives a jurisdictional notice that permits the Tax Court to hear a tax case through filing the petition to start the case and the motions practice, to discovery and trial preparation, and on to the final disposition of the case and then appeal of a fully or partially unfavorable result if necessary. It is intended to be useful to both practitioners attempting to navigate their way through their first or their hundredth Tax Court case, making it much easier to avoid the pitfalls that can come from not being aware of the intricacies of a particular court's rules and its application of the rules. This book will also help readers understand where there are similarities between the Tax Court and the district courts as well as where there are critical differences. The book points out the differences that practitioners need to know when representing clients in the different kinds of cases that are available just within the Tax Court, as the Tax Court hears both regular tax cases and small tax cases, and it tries cases that are reviewed *de novo* and cases where it reviews for abuse of discretion, all of which may make a difference in what the court can and will accept as evidence, the types of witnesses that may be called, and the procedure that will be used before, during, and after trial.

What makes this book different from other works on procedural litigation is that although it will provide some introductory information regarding other options in tax litigation and will periodically compare what would happen had another alternatives been chosen, this book is focused exclusively on practice and procedure in the Tax Court. Moreover, this book will help by pointing out some of the pitfalls that can be found along the way and how to avoid them, so that those who are generally familiar with litigation, but do not make a regular practice of bringing controversies before the Tax Court, will be able to more easily represent their clients well. Other books have and do address the ways that lawyers address the finer points of negotiating on behalf of their clients in the context of Tax Court cases; that is not what this book is designed to do. This book is (1) a guide to the rules, (2) a guide to practice from the day that taxpayers receive the statutory notices providing access to the Tax Court (hopefully

well after having retained the services of attorneys), and (3) a guide to following the case through the court from the filing of the petition through the final judgment and any opportunity to appeal the final determination.

This book also will provide insights for those practitioners who seldom find themselves involved in litigation and even less often find themselves in the Tax Court. It is designed to help all practitioners avoid some of the most easily avoided pitfalls that can sneak up on unsuspecting practitioners who approach the Tax Court just as they would any other federal court. Although in recent years the Tax Court has made its rules more closely resemble the Federal Rules of Civil Procedure, the Tax Court is not part of the Judicial College and is not required to conform its rules in most cases. The Tax Court is statutorily authorized to promulgate its own rules of practice and procedure. Practitioners who assume that they are litigators in one court and therefore know how to practice in the Tax Court do so only at their own peril.

I hope that this guide is helpful and would welcome suggestions and comments for future revisions.

Acknowledgments

As anyone who has ever undertaken a major writing project knows, it is never a solo effort, notwithstanding the many hours spent silently in front of the computer. That is certainly true of this book.

I owe an enormous debt of gratitude to all of my colleagues who have read parts of the book, discussed issues of procedure, and provided encouragement along the way. In particular, I want to thank my former tax colleagues at Capital University School of Law—Professors Richard J. Wood, Myron C. Grauer, and Robert Wade—and my current tax colleagues at Albany Law School—Professors Deborah S. Kearns, and David Pratt as well as Associate Dean for Research and Development James Thuo Gathii—for their input and support.

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Of course, it goes without saying that any errors remain solely and exclusively my own.

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April 2011

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