



DAILY TAX REPORT



Reproduced with permission from Daily Tax Report, 51 DTR K-2, 3/18/2010. Copyright © 2010 by The Bureau of National Affairs, Inc. (800-372-1033) <http://www.bna.com>

Tax Litigation

Government Attorneys Coordinating More in Tax Litigation, Panelists Say

Panelists at a March 17 District of Columbia Bar Taxation Section program on tax litigation said that there is currently a high amount of coordination between the Department of Justice and Internal Revenue Service in tax litigation cases.

Government panelists participating in a program on tax litigation discussed anecdotal information about DOJ attorneys sitting in on U.S. Tax Court litigation, which is handled by IRS attorneys from a local Office of Chief Counsel, and IRS attorneys that sit in on federal district court or Court of Federal Claims litigation, which are handled by DOJ attorneys or counsel from U.S. Attorney offices.

The program on tax litigation examined forum selection and crucial elements to be considered during the pre-trial, trial, and post-trial stages.

U.S. Tax Court. Nancy Carver, associate area counsel in IRS's Small Business/Self-Employed Division, Group 1, said that the Tax Court is very different from the other federal courts that deal with tax.

The court has very limited jurisdiction; a petition can be filed only if the taxpayer has received a statutory notice of deficiency, a notice of determination in a collection due process case, or in response to a request for innocent spouse relief. The petition must be filed within 90 days of the date of the statutory notice.

Carver said that the Tax Court is extremely specialized and the judges understand "what is going on." She added that the court does not have equitable powers and that judges may be sympathetic but cannot help a taxpayer.

Carver said IRS is permitted to raise new issues as "new matters" in the Tax Court. There are no restrictions on its ability to raise new issues in its answer to

the taxpayer's petition and none on its ability to recover the tax associated with those new issues.

Other issues to consider about the court, Carver said, are the limits on the discovery procedures and that parties must stipulate to facts that are material and relevant to the litigation.

During a discussion about the use of stipulations, Matthew Hicks, Caplin & Drysdale, Washington, D.C., suggested that stipulations outside of the Tax Court are "misguided."

Hicks said that filing a petition in the U.S. Tax Court is different from filing a suit in a federal district court or the U.S. Court of Federal Claims. In the latter two courts, Hicks said that full payment of the taxes has to be made, with an exception for employment taxes. He said that a taxpayer can pay for one quarter or one employee and then the government will file a counterclaim for the balance of the taxes owed.

Hicks said that a refund claim must be filed within the statutory limitations period of Internal Revenue Code Section 6511.

Court of Federal Claims, District Courts. Hicks said that filing a Freedom of Information Act request prior to filing a tax refund suit and getting information from the DOJ in preparation for litigation is helpful. One problem, however, may be the length of time it takes for the FOIA request to be processed.

Cory Johnson, DOJ Tax Division, Court of Federal Claims Section, explained that the Court of Federal Claims had limited jurisdiction as to the types of cases it presides over but is a court with national jurisdiction. He explained that the judges in the court would not be tax specialists but that they normally heard more tax cases than typical district court judges.

Another difference is that, because the Court of Federal Claims has national jurisdiction, many of the pre-trial activities—status and routine hearings, for example—are done by telephone, Johnson said.

Johnson reminded practitioners that no jury trials are permitted in the Court of Federal Claims and that the rules are similar to, but differ from, the Federal Rules of

Civil Procedure as the government is the only defendant.

Johnson said that the court also allows video participation of a witness, provided that the witness is not a principal in the case.

He added that the stipulations of the amounts of taxes are appreciated by the judges.

Hicks said that the prime benefit of doing tax litigation in the district court is that it puts the “government through its paces.” He explained that district court judges know the rules of procedure and evidence because they have to, especially in criminal cases.

Hicks said far more discovery is allowed in district court litigation but the use of subpoenas is more limited.

In refund litigation, Hicks said that the government is allowed to raise new issues only as “offsets” but has no restrictions on its ability to raise new issues in its answer to the taxpayer’s complaint. There is a restriction on the government’s ability to recover the tax associated with the new issues, he said.

Alexis MacIvor, Steptoe & Johnson, Washington, D.C., who moderated the panel, suggested that tax litigation in district courts or the Court of Federal Claims is more informal than in the past because the Tax Court is more informal—a suggestion that was met with mixed reactions.

The panel was co-sponsored by the bar’s New Tax Practitioners Committee and Tax Audits and Litigation Committee of the Taxation Section.

BY ROBERT T. ZUNG