THE UNITED STATES TAX COURT (“Tax Court”) offers taxpayers simplified and expeditious procedures for disputes involving amounts of $50,000 or less. Allowing taxpayers to elect “small tax case” status promotes efficiency in the Tax Court and makes it easier for taxpayers to have their day in court. Despite the ease with which small tax case status grants taxpayers access to judicial review, small tax cases remain difficult for taxpayers to win. Analysis of recent small case decisions reveals why taxpayers frequently lose small tax cases and provides guidance on what taxpayers can do to improve their chances for success.

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This is another in a continuing series of articles written by members of the ABA Tax Section in which a senior member of the section teams up with a member selected from the Young Lawyers Forum.

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Congress established the United States Tax Court under Article I of the Constitution as part of the Tax Reform Act of 1969, Pub. L. No. 91-172 (codified in relevant part at 26 U.S.C. §§7441-7487) (Unless otherwise designated, all section references are to the Internal Revenue Code of 1986, as amended). The court was established as a continuation of the Tax Court of the United States, a quasi-judicial agency that was administered by the executive branch. The Senate Finance Committee Report accompanying the 1969 Act indicated that one of the primary reasons for establishing the Tax Court was to provide “special procedures for handling small claims.” The report stated: “Many taxpayers with small claims believe they have no practical opportunity to present their claims before an impartial tribunal, and so they conclude they must abide by the decisions of the Internal Revenue Service. While the Tax Court procedures are less complicated in many respects than those of other courts, they remain formal in nature because the Court and the Internal Revenue Service must consider not just the amount involved in any particular case but also the precedent that it might provide for future cases. In addition, since decisions in these cases are subject to review in the appropriate Court of Appeals (and then, perhaps, in the Supreme Court), a complete record must be prepared of the proceedings in each case and the Court’s findings of fact and opinion must be sufficiently detailed to permit a proper review. Although the Tax Court has instituted simplified procedures in small cases, formal rules of evidence often constitute a difficult barrier to the taxpayer who represents himself. The committee had concluded that taxpayers with small cases need to have practical access to the Tax Court.” S. Rep. No. 91-552, at 2341 (1969).

Thus, the Tax Court was established with a mandate to provide “simplified and relatively informal procedures” for the resolution of small tax cases. Id. at 2342. As noted in the Senate report, it was expected that taxpayers with small amounts in dispute would likely represent themselves in the Tax Court. The goal of the legislation was to create an informal judicial forum that was accessible to the average taxpayer and would spare the government the expense of creating a full trial record when only small amounts were in dispute.

Concurrent with the establishment of the Tax Court, Congress enacted section 7463, defining small tax matters. Small case status was originally reserved for taxpayers with disputed amounts of deficiency or overpayment not in excess of $1,000 as to any one taxable year or event. To further accommodate the Tax Court’s mandate of fostering efficient taxpayer access to judicial review of IRS determinations, Congress also authorized the court to issue decisions that are not subject to appeal and do not constitute precedent for future cases.

By eliminating the potential for review associated with traditional judicial proceedings, Congress enabled the Tax Court to adopt informal rules and procedures without running the risk that subsequent appeals would be hampered by inaccurate or incomplete records from the initial trial. Removing the weight of precedence from small tax cases also allowed the Tax Court to render decisions on a summary basis, without having to consider whether the court would be setting precedent for related issues in future cases. (Note that on April 12, 2006, the Supreme Court approved Fed. R. App. P. 32.1, allowing for the citation of “unpublished” or “non-precedential” opinions in all federal courts. The rule does not explicitly add weight to opinions that are otherwise without precedential authority. It merely allows practitioners to cite these opinions in all federal courts. Because the rule goes into effect on January 1, 2007, its practical effect remains to be seen. Before Rule 32.1, some circuits prohibited the ci-
Historically, the relaxed procedural requirements for small tax cases meant that opinions were unpublished. Today small tax case opinions are available through numerous case reporting services, and the Tax Court publishes its small tax cases dating back to 1995 on its website, www.ustaxcourt.gov. Although the opinions cannot be cited as precedent, they do provide useful insight into the court’s treatment of small tax cases.

This article examines recent small tax case litigation to determine if the mandate of the court has been achieved nearly 40 years after its separation from the executive branch. The analysis in this article focuses on decisions from the 2005 calendar year, in which 189 small tax cases were decided by the Tax Court. It also identifies trends in small tax decisions, and makes recommendations for taxpayers who will represent themselves “pro se” before the Tax Court. A subsequent article will analyze a larger sample of small tax decisions, and compare those decisions against similar decisions of the Tax Court where small tax case status was not elected.

**ELEMENTS OF A SMALL TAX CASE**

The original version of section 7463 has remained largely unchanged since its enactment in 1969. The most significant change has been an increase in the cap of the amount in dispute in small tax cases. Today small tax cases must meet the following criteria:

- The case cannot involve disputes over amounts in excess of $50,000 for any one tax year or taxable event, inclusive of any proposed additions to tax and/or penalties alleged to be owed by the taxpayer. §7463(a)(1-4), (e).
- As with all cases before the Tax Court, the dispute giving rise to a small tax case must relate to income tax, estate or gift tax, or miscellaneous excise taxes imposed under subtitle D. Small tax case status is also available for taxpayers seeking relief from joint and several liability (commonly known as “innocent spouse relief”) under section 6015(e), or the appeal of a levy action under section 6330(d)(1)(A), provided that the amount in dispute does not exceed the above-mentioned $50,000 limit. See §7463(a)-(1-4), (e), (f)(1-2), and Tax Court Rule 331(a).
- Taxpayers must elect small case status and the Tax Court must not object to allowing the case to proceed as a small tax case. The court reserves the right to deny or revoke small case status if an issue is raised for which the court desires to set precedent. In addition, the court must revoke small case status if the proceedings reveal that the amount in dispute is in excess of the $50,000 limit (e.g., through the imposition of additional penalties). §7463(d).

**SMALL TAX CASE PROCEDURE**

Section 7463(a) provides that small tax case proceedings are to be “conducted in accordance with such rules of evidence, practice, and procedure as the Tax Court may prescribe.” Consistent with the Congressional intent of creating simplified and informal procedures for small claims, the Tax Court has adopted five short rules that provide simplicity for taxpayers filing small claims petitions. The rules and related forms are available on the Tax Court’s website and are summarized below:

- **Rule 171—Election Of Small Tax Case Procedure:** When an amount in dispute is $50,000 or less, a taxpayer is not required to, but may request that the proceedings be conducted as a small tax case. Taxpayers do not have a right to small case status, and the court retains the authority to deny or revoke small case status.
  - **Rule 172—Representation:** A petitioner may appear without representation in small tax cases or may be represented by anyone admitted to practice before the Tax Court.
• Rule 173—Pleadings: A taxpayer requests small tax case status by filing Tax Court Form 2 (the petition for small tax case status). The form should be accompanied by a $60 filing fee, which the court can waive if the taxpayer files an affidavit containing specific financial information regarding the taxpayer’s inability to pay the fee. Once the initial petition is filed, no answer is required from the IRS except when there is an issue on which the Commissioner bears the burden of proof or when the court otherwise directs. Similarly, no reply is required from the taxpayer unless the court otherwise directs.

• Rule 174—Trial: A taxpayer may designate the location of the trial by completing Tax Court Form 5 (designation of place of trial). The court will make every effort to conduct the trial at the location most convenient to that designated, when suitable facilities are available. Trials will be conducted as “informally as possible consistent with orderly procedure” and “any evidence deemed by the Court to have probative value shall be admissible.” Neither briefs nor oral arguments will be required unless the court otherwise directs.

• Rule 175—Number of Copies of Papers: An original and two copies of any documents submitted should be filed for small tax cases.

These five rules demonstrate that the court has complied with its mandate to provide simple and informal procedures that promote ease of access for taxpayers to bring disputes over small amounts before the court. As a practical matter, the $50,000 limit on the amount in dispute is prohibitive to large taxpayers. Thus, it is primarily individuals and small businesses that will avail themselves of small tax case proceedings. Further, despite the $50,000 limit, small tax cases heard by the Tax Court generally involve much smaller amounts. In 2005, the average amount in dispute for small tax cases was approximately $5,000 and the average penalties associated with alleged deficiencies were approximately $1,400. (Averages are based on a review of the 189 small tax cases in 2005. The average amounts in dispute and penalties include cases in which there were either (i) no amounts in dispute, or (ii) no penalties imposed; these cases were counted as zeros in computing the averages.) In many cases, the amounts in dispute were significantly lower than these averages. These data suggest that taxpayers with disputes approaching the $50,000 limit prefer to retain the right to appeal an unfavorable decision.

ANALYSIS OF SMALL TAX CASE DECISIONS • Despite the taxpayer-friendly nature of small tax case proceedings, the decisions in these cases do not appear to be taxpayer friendly. The Tax Court published 189 small tax case opinions for the 2005 calendar year; of these cases, 82 percent were decided against the taxpayer on one or more of the primary issues. The 18 percent taxpayer success rate observed in 2005 is similar to the 14.3 percent success rate found in 1996 for taxpayers in small tax cases. See Glenn Kroll, Are Tax Court Judges Partial to the Government?, 45 Oil & Gas Tax Q. 135 (1996). See also James Edward Maule, Instant Replay, Weak Teams, and Disputed Calls: An Empirical Study of Alleged Tax Court Judge Bias, 66 Tenn. L. Rev. 351 (1999), for broader statistical analysis of Tax Court decisions. The Statistics and Reports Section of the United States Tax Court also publishes an annual report on Tax Court decisions entitled United States Tax Court Statistical Information.

Although some commentators have speculated that the Tax Court, and particularly in small tax cases, is biased in favor of the federal government, analysis of small tax cases reveals that there are several factors that may contribute to the high percentage of decisions against taxpayers that emerge from the Tax Court in these cases. These factors are discussed below, with practical tips on how best to avoid a similar fate.