

Non-Lawyers' Handbook for Assisting Clients with Their Tax Court Cases

By David M. Fogel

David Fogel discusses the types of cases that can be filed in Tax Court, who can represent clients there, how to prepare and file a petition, and what to expect after the petition is filed. He also outlines the types of activities in which non-attorneys may (and may not) engage with respect to representing a client in a Tax Court case.

When a client receives a Notice of Deficiency or a Notice of Determination from the IRS, many non-lawyer tax practitioners refer the client to an attorney to take over. While that may be the proper decision if the amount of the deficiency is large or the issues in dispute are complex, in many smaller, less-complex cases, non-lawyers may be able to help the client by preparing a simple petition for the client to sign and file with the Tax Court. If the non-lawyer is a CPA or Enrolled Agent, he or she can stay involved in the case during settlement negotiations with the IRS. This article discusses the types of cases that can be filed in Tax Court, who can represent clients there, how to prepare and file a petition and what to expect after the petition is filed. It also outlines the types of activities in which non-attorneys may (and may not) engage with respect to representing a client in a Tax Court case.

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Tax Court's Jurisdiction

There are several different types of cases that may be brought before the Tax Court (see Table 1). In general, these are cases where the IRS has issued the taxpayer a notice of deficiency (most types of cases), a determination letter (abatement of interest, worker classification, innocent spouse, lien/levy cases) or a final partnership/S corporation administrative adjustment (for a "TEFRA" partnership/S corporation).

The Tax Court has jurisdiction if a "timely petition" (a petition filed within the statutory time period) is filed with the court.¹ The "statutory time period" is usually 90 days from the date the notice of deficiency was issued; 150 days if the notice of deficiency was mailed to a foreign address; 180 days for an abatement of interest case; 90 days for a worker classification or innocent spouse case; and 30 days for a lien/levy case.

These statutory time periods are strictly enforced. For the court to have jurisdiction, the petition must be filed on or before the deadline. The court recognizes the "timely mailed is timely filed" rule,² so if the petition is mailed to the court close to the deadline, proof of mailing should be obtained.

Almost any document, no matter how imperfect, will usually be accepted as a petition so long as the court can determine that some identifiable person is petitioning something. If an imperfect petition is filed, the court will give the petitioner a chance to perfect it later on.

Table 1

Type of Case	Tax Court Rule No.
Income Tax	13(a)
Gift Tax	13(a)
Estate Tax	13(a)
Certain Excise Taxes	13(a)
Transferee Liability	13(a)
Declaratory Judgment (includes qualification of certain pension plans, values of certain gifts, status of certain government obligations, an estate's qualification for installment payments under Code Sec. 6166, and qualification of certain exempt organizations)	210(c)
Certain Disclosure Actions	220(c)
Adjustment of Partnership Items of a "TEFRA" Partnership	240(c)
Administrative Costs under Code Sec. 7430(f)(2)	270(c)
Review of IRS's Failure to Abate Interest under Code Sec. 6404(e)	280(b)
Bankruptcy Cases (the taxpayer must ask the Bankruptcy Court, under Bankruptcy Code §362(d)(2), to lift the automatic stay so that the taxpayer may file a petition with the Tax Court)	13(e)
Determination of Worker Classification (Employment Status) under Code Sec. 7436	290(b)
Determination of "Innocent Spouse" Relief	320(b)
Certain Lien and Levy Actions under Code Secs. 6320(c) and 6330(d) ("Collection Due Process" cases)	330(b)

But a petition filed late (even one day) will not invoke the court's jurisdiction. The case will be dismissed, and this will be followed by assessment and collection efforts, which will upset the client and quite possibly result in a malpractice claim.

Who Can Represent in Tax Court?

Taxpayers may either represent themselves (*pro se*), or they may be represented by counsel if such counsel is admitted to practice before the court.³ An individual who is not admitted to practice before the court is not allowed to represent the taxpayer.⁴ A person may "enter an appearance" as counsel either by signing the petition and specifying his or her name and address, or by filing with the court a separate Entry of Appearance (Tax Court Form 3).⁵ See the sidebar list of Tax Court forms accompanying this article.

Attorneys may be admitted to practice before the Tax Court by filing an application and paying the ap-

propriate fee (currently \$35). Non-attorneys may be admitted to practice by filing an application, passing the Tax Court's examination and paying the appropriate fee. The Tax Court's examination for non-attorneys is usually given once every other year during November in Washington, D.C. The examination covers the court's rules (25 percent), the Federal Rules of Evidence (25 percent), federal tax law (40 percent) and legal ethics (10 percent). Applicants who wish to take the exam may obtain copies of recent exams from the Clerk of the Court for 50 cents per page.

The decision regarding whether clients should represent themselves or whether they need to be represented by counsel usually involves an analysis of the size and complexity of the case. For example, if the notice of deficiency disallows some claimed deductions for lack of substantiation, and the amount of the

deficiency is relatively small, clients can probably represent themselves. However, if more complex issues are involved and the client would benefit from representation by counsel to defend these issues, or if the amount of the deficiency is large, then clients probably will need representation by counsel.

Preparing and Filing the Petition

As stated above, if the amount of the deficiency is relatively small and the issues are not complex, a non-lawyer may be able to help the client by preparing a simple petition for the client to sign and file with the Tax Court.

There are two preprinted petition forms accepted by the court: Form 1, used for all cases except Small Tax Cases, and Form 2 for Small Tax Cases (the Small Tax Case election is discussed below). These forms may be downloaded from the court's Web site, www.ustaxcourt.gov.

The Tax Court's Web site is www.ustaxcourt.gov. Several helpful documents may be downloaded from this Web site in Adobe Acrobat format (.pdf), including preprinted forms and the full text of the Tax Court's Rules of Practice and Procedure.

Downloadable Forms Available at Tax Court's Web site	
Form Number	Description
Form 1	Petition (Other Than Small Tax Case)
Form 2	Petition (Small Tax Case)
Form 3	Entry of Appearance
Form 4	Substitution of Counsel
Form 5	Designation of Place of Trial
Form 6	Subpoena
Form 7	Application for Order to Take Deposition
Form 8	Certificate on Return
Form 9	Notice of Appeal to Court of Appeals
Form 10	Certificate of Service
Form 11	Notice of Election to Intervene
Form 12	Notice of Election to Participate
Form 13	Petition for Administrative Costs—Code Sec. 7430(f)(2)

Pro se taxpayers tend to prefer using the preprinted forms, while lawyers tend to prefer submitting a typed petition. A typed petition must conform to certain standards of form and style such as the size and weight of paper, size of type, the font, spacing and margins.⁶

The petition consists of four sections: the caption, the body, the prayer and the signature. A sample petition accompanies this article.

The caption lists the names of the petitioners and includes a space for the docket number.⁷ The body of the petition, which should be double-spaced, includes an introductory paragraph and five additional numbered paragraphs.⁸

- The introductory paragraph states that the petitioner is seeking redetermination of the deficiency set forth in the IRS's notice of deficiency.
- Paragraphs 1 through 3 provide identification information such as the petitioner's address, taxpayer identification number (TIN) and information from the IRS's notice of deficiency, and state which portion of the deficiency is in dispute.
- Paragraph 4 lists the errors that the IRS made in its notice of deficiency (e.g., "The Commissioner erred in disallowing petitioner's \$2,500 interest deduction").

- Paragraph 5 lists the facts upon which the petitioner relies as the basis for his or her position (e.g., "Petitioner paid \$2,500 of deductible interest during the taxable year").

The prayer is a paragraph that specifies the relief being requested (*i.e.*, that the court should determine that there is no deficiency).⁹ A copy of each notice of deficiency being petitioned should be attached as an exhibit to the petition.¹⁰

Quite often, practitioners include too much verbiage in paragraphs 4 and 5, sometimes to the client's detriment. In preparing a petition, the overriding principle should be to "keep it simple." Also, arguments should not be included in the petition (e.g., do not explain *why* a particular deduction ought to be allowed), and no exhibits should be attached to the petition except for the notice(s) of deficiency.

If there are additional deductions or credits that should be allowed (e.g., items shown in a claim), and these additional items have not been allowed in the notice of deficiency, they should be raised in

paragraphs 4 and 5 of the petition. Although the court generally requires the IRS to determine a deficiency before it will take jurisdiction, it also has jurisdiction to determine an overpayment if that turns out to be the ultimate outcome of the case.¹¹

An original and two copies of the petition must be sent to the Tax Court at 400 Second Street N.W., Washington, DC 20217, along with a \$60.00 filing fee for each petition filed.¹² Taxpayers who receive separate notices of deficiency at the same time, each of which is for one or more years, can save filing fees by combining all years on one petition.¹³ *The petition should not be sent to the IRS.* The court will do that.

An original and two copies of a Designation of Place of Trial (Tax Court Form 5) should accompany the petition and the filing fee.¹⁴

Small Tax Case Election

Under Code Sec. 7463, if the amount in dispute (tax and penalties) is \$50,000 or less for each and every year included in the petition, the taxpayer may elect to have the case treated as a Small Tax Case.¹⁵ The election is made on the petition.¹⁶ Advantages to making this election are that the petition is simpler to file, the IRS

UNITED STATES TAX COURT

JOHN A. AND MARY B. TAXPAYER,)	
)	
Petitioners,)	
)	
v.)	Docket No.
)	
COMMISSIONER OF INTERNAL REVENUE,)	
)	
Respondent.)	

PETITION

The petitioners hereby petition for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in the Commissioner's notice of deficiency dated March 2, 2005, and as the basis for the petitioners' case, allege as follows:

1. The petitioners are individuals with mailing address now at 234 Market Street, Sacramento, California 95825 and with legal residence now at the same address. The petitioners' taxpayer identification numbers are 123-45-6789 and 987-65-4321. The return for the period here involved was filed with the Office of the Internal Revenue Service at Fresno, California.

2. The notice of deficiency (a copy of which, including so much of the statement and schedules accompanying the notice as is material, is attached and marked Exhibit A) was mailed to the petitioners on March 2, 2005, and was issued by the Office of Internal Revenue at Oakland, California.

3. The deficiency as determined by the Commissioner is in income tax for the calendar year 2003, in the amount of \$10,000.00, together with a penalty under the provisions of I.R.C. § 6662(a) in the amount of \$2,000.00, all of which is in dispute.

4. The determination of the tax set forth in the said notice of deficiency is based upon the following errors:

a. The Commissioner erred in determining for 2003 that petitioners omitted \$36,000.00 in Schedule C income.

b. The Commissioner erred in determining for 2003 that the petitioners are not entitled to deduct \$4,000.00 in charitable contributions.

c. The Commissioner erred in determining for 2003 that petitioners are liable for a penalty under the provisions of I.R.C. §6662(a) in the amount of \$2,000.00.

5. The facts upon which the petitioners rely, as the basis of the petitioners' case, are as follows:

a. Petitioners did not omit any Schedule C income from their 1999 return.

b. During 2003, petitioners had \$4,000.00 in charitable contributions.

c. Petitioners are not liable for the penalty under the provisions of I.R.C. §6662(a).

WHEREFORE, petitioners pray that the Court determine that there is no deficiency in income tax and no penalty due from the petitioners for the taxable year 2003, and give such further relief as the Court may deem fit and proper.

_____ Date: _____
 John A. Taxpayer,
 Petitioner

_____ Date: _____
 Mary B. Taxpayer,
 Petitioner
 234 Market Street
 Sacramento, CA 95825
 Tel. (916) 555-1212

is not required to file an Answer to the petition (unless it has the burden of proof and must make affirmative allegations of fact to support that burden) and if a trial is held, it is conducted informally with relaxed rules of evidence and no briefs required.¹⁷ Neither party may appeal the court's decision.¹⁸ The taxpayer may "opt out" of the election at any time before the court's decision is final by filing a motion with the court.¹⁹

What to Expect After Filing the Petition

After the petition is filed, the court will assign a docket number to the case and notify both parties.²⁰ Unless the Small Tax Case election has been made, within 60 days the IRS counsel attorney will file an Answer either admitting or denying the allegations contained in the petition.²¹

If the IRS has the burden of proof on any issue (for example, a civil fraud penalty), then the IRS's Answer must contain affirmative allegations of fact to support that issue.²² If the Answer contains these affirmative allegations of fact, then the taxpayer must file a Reply within 45 days from the date of the Answer either admitting or denying the affirmative allegations of fact.²³ If no Reply is filed, then the IRS could ask the court to assume that the affirmative allegations of fact in the Answer are deemed admitted.²⁴

Subsequently, the case will usually be referred to the IRS's Appeals Division to consider settlement.²⁵

Practice of Law

Non-attorneys might be concerned about whether preparing a petition for a client or giving other advice in connection with a Tax Court case constitutes the practice of law.

When it comes to preparing simple forms to be filed with a court the law is not very clear, and not even lawyers agree among themselves as to whether this constitutes the practice of law. This is further complicated by the fact that most non-lawyer tax practitioners are allowed to advise a client about all sorts of matters involving tax law, including the procedures for filing a Tax Court petition in response to a notice of deficiency. While such advice is technically considered the practice of law, it is nonetheless a permitted activity for a non-lawyer tax practitioner.

State law controls the determination of whether an individual has engaged in the practice of law.²⁶ Most states have laws describing what constitutes the practice

of law.²⁷ In most states, preparing legal documents and advising clients in the use of such documents constitutes the practice of law.²⁸ However, there are exceptions. For example, bankruptcy law specifically recognizes that a non-lawyer may prepare a bankruptcy petition based on written information provided by the debtor.²⁹ A problem arises when the activity goes beyond simply transcribing information, to soliciting specific information or providing advice to clients.³⁰ Court cases generally distinguish between simply transcribing information provided by the client onto a form (which is permitted) and making changes to the information or suggestions based on the information provided (which is prohibited).³¹

The Tax Court offers two different preprinted forms to be used as Tax Court petitions: Form 1, the regular petition, and Form 2, the petition for Small Tax Case. If a non-lawyer "fills in the blanks" on one of these petition forms and gives it to the client to file with the court, is this engaging in the practice of law? Probably not, because this is simply transcribing information provided by the client onto a form.³² The same result would probably occur if the client's information were transcribed onto a typed petition. However, if legal questions are involved, then resolving those questions by providing advice and other activities may constitute the practice of law.³³

What if a lawyer supervises the non-lawyer's work? In that case, the activities do not constitute the practice of law.³⁴

It appears, then, that if a non-lawyer tax practitioner prepares a Tax Court petition for the client by simply transcribing information provided by the client onto a petition form, ordinarily, this would not constitute the practice of law. But if the non-lawyer considers such issues as whether the petition is legally sufficient, whether all issues that need to be raised have in fact been raised in the petition or if preparation of the petition goes beyond merely assembling information into the proper petition format, then these activities would probably "cross the line." If there are any doubts, it might be wise for a non-lawyer who prepares a petition on behalf of a client to have it reviewed by a tax lawyer before filing it with the Tax Court.

How Far May a Non-Lawyer Go to Represent Clients in Tax Court Cases?

Non-lawyers may provide advice to clients about petitioning the Tax Court in response to a notice of

deficiency and may assist in the preparation of the petition subject to the limitations discussed above. Here is a list of suggestions for non-lawyers who give advice and assistance to clients who have received a notice of deficiency from the IRS:

- In appropriate cases, a non-lawyer *should* prepare a simple “fill-in-the-blanks” petition for clients to sign and file with the Tax Court.
- A non-lawyer *should* advise clients to send the petition to the Tax Court *via* certified mail and to get proof of mailing.
- A non-lawyer *should* consult a lawyer if a decision needs to be made about:
 - whether the client would be better off filing in Tax Court, District Court or Claims Court;
 - whether the clients should “opt out” of the Small Tax Case election;
 - who is the proper party petitioner (e.g., separated spouses where a joint return was filed, deceased client, suspended corporation); or
 - any doubts as to whether the non-lawyer is engaging in the practice of law.
- A non-lawyer *should only* prepare the petition if he or she knows all of the issues that need to be raised in the petition.
- A non-lawyer *probably should* prepare a petition for only clients known well, where he or she was involved in the audit and there is a low risk that the client will later claim that the non-lawyer engaged in the practice of law.

If a non-lawyer prepares a Tax Court petition for a client, a signed statement should probably be obtained from the client acknowledging that the practitioner is not a lawyer, stating that preparing the petition does not constitute the practice of law and that consultation with a lawyer is recommended.

Non-lawyer tax practitioners who are not admitted to practice before the Tax Court cannot represent their clients in Tax Court, either by listing themselves as “counsel” on papers filed with the court or by appearing in court as their clients’ counsel. But can such

individuals represent their clients in dealings with the IRS after a petition has been filed in Tax Court? If the clients’ case ultimately goes to trial, can such a representative assist the client in preparing for trial?

After the petition is filed, a CPA or Enrolled Agent can, and should, represent the client in settlement negotiations with IRS Appeals and/or IRS Counsel.³⁵ Beyond that, they should not assist their clients in preparing the case for trial because this would probably be considered the practice of law.

In addition, although non-lawyers who have passed the Tax Court’s exam and have been admitted to practice before the Tax Court may have demonstrated that they have the potential capability of representing clients in Tax Court (including trials), they cannot be fully prepared for all of the complexities, subtleties and strategies of a trial. Simply put, trials should be left to lawyers.

Conclusion

In order to properly advise a client who has received a notice of deficiency, an understanding of the court’s rules and procedures is essential, including an understanding of how to prepare a petition.

Non-lawyers who are not admitted to practice before the Tax Court should be mindful of the activities involving their clients’ Tax Court cases which constitute the practice of law. Non-lawyers probably should not represent clients in Tax Court trials, even if the court would permit it. Nonetheless, they can probably prepare a simple petition for the client to sign and file with the court. After the petition is filed, non-lawyers who are CPAs or Enrolled Agents can certainly represent the client in settlement negotiations with IRS Appeals and Counsel personnel.

Non-lawyers who prepare a Tax Court petition should probably obtain a signed statement from the client acknowledging that the practitioner is not a lawyer, stating that preparing the petition does not constitute the practice of law and recommending consultation with a lawyer.

ENDNOTES

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¹ Rule 13(c). Rule references are to the Tax Court Rules of Practice and Procedure. For the remainder of this article, “notice of deficiency” will be used. The rules are substantially the same for cases in which the IRS issued a determination letter or a final

partnership/S corporation administrative adjustment.

² See Code Sec. 7502.

³ Rule 24(a) and (b).

⁴ Rule 24(a)(4).

⁵ Rule 24(a)(2) and (3).

⁶ Rule 23.

⁷ Rule 32(a).

⁸ Rules 34(b) and 23(d).

⁹ Rule 34(b)(6).

¹⁰ Rule 34(b)(8).

¹¹ See Code Sec. 6512(b).

¹² Rule 34(d).

¹³ Rule 34(a)(1).

¹⁴ Rule 140(a).

¹⁵ Rules 170 through 179.

¹⁶ Tax Court Form 2 (petition for a Small Tax Case) has a box above the signature area which the taxpayer can check to indicate that the election is not being made.



ENDNOTES

- ¹⁷ Rules 173 and 174.
- ¹⁸ Code Sec. 7463(b).
- ¹⁹ Code Sec. 7463(d).
- ²⁰ Rule 35.
- ²¹ Rule 36.
- ²² Rule 36(b).
- ²³ Rule 37.
- ²⁴ Rule 37(c).
- ²⁵ Rev. Proc. 87-24, 1987-1 CB 720.
- ²⁶ *In re Bachmann*, DC BC Fla., 113 BR 769, 772 (1990); *In re Samuels*, DC BC Fla., 176 BR 616, 620 (1994); *In re Anderson*, DC BC Cal., 79 BR 482 (1987).
- ²⁷ For example, in California, the unauthorized practice of law is governed by section 6125 of the Business and Professions Code, which states, “No person shall practice law in California unless the person is an active member of the State Bar.”
- ²⁸ *Grievance Comm. v. Dacey*, Conn. SCt, 154 Conn. 129, 222 A.2d 339 (1966) (non-lawyer preparing wills and trusts); *In re Florida Bar*, Fla. SCt, 215 So2d 613 (1968) (giving advice and preparing documents concerning the disposition of property); *Washington State Bar Assn. v. Great Western Union Fed. S&L*, Wash. SCt, 91 Wn2d 48, 586 P2d 870 (1978) (drafting deeds and notes); *Comm. on Professional Ethics and Conduct v. Baker*, Iowa SCt, 492 NW2d 695 (1992) (preparing legal instruments); and *Richland County Bar Assn. v. Clapp*, 84 OhioSt3d 276, 703 NE2d 771 (1998) (non-lawyer preparing motions and pleadings and filing them on behalf of clients).
- ²⁹ 11 USC §110; *In re Agyekum*, BAP CA-9, 225 BR 695 (1998).
- ³⁰ *In re Agyekum, id.*, at 702 (soliciting information from a debtor which is then typed onto schedules of a bankruptcy petition constitutes the practice of law); *In re Samuels, supra* note 26 (non-lawyers providing bankruptcy services were not allowed to do more than typing or transcribing written information provided to them by the client onto preprinted forms); *In re McDaniel*, DC BC Tex., 232 BR 674 (1999) (giving client legal advice in bankruptcy matter, attending creditors meetings and dealing with creditors constitutes the practice of law).
- ³¹ Catherine J. Lanctot, “What Needs Fixing?”: *Scriveners in Cyberspace: Online Document Preparation and the Unauthorized Practice of Law*, 30 HOFSTRA L. REV. 811, 834.
- ³² For example, regarding California law on this point, see Ethics Opinion 1983-7, San Diego Bar Assn.
- ³³ *Baron v. City of Los Angeles*, Cal. SCt, 2 Cal3d 535, 469 P2d 353 (1970).
- ³⁴ ABA Ethical Consideration 3-6.
- ³⁵ See Circular 230, §10.7(c)(viii), 31 CFR Part 10.

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