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Tax Controversy

USA: Law & Practice

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Law and Practice

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1. TAX CONTROVERSIES

1.1 Tax Controversies in this Jurisdiction

The largest tax controversies in the USA (in terms of amount at issue) usually arise in one of two ways. First, after the United States Internal Revenue Service (IRS) audits a taxpayer's income tax return, the IRS may assert that the taxpayer owes additional tax ("deficiency" posture). Second, after paying tax the taxpayer may file a claim for a refund asserting that the taxpayer overpaid its proper tax liability, and the IRS may deny that claim ("refund" posture).

Tax controversies also can arise in other ways. For instance, without auditing a taxpayer's tax return, the IRS may assert that the taxpayer owes additional tax based on information reported to the IRS from other sources (such as a financial institution). A taxpayer's failure to notify the IRS of particular items – such as a foreign bank account – can also yield tax controversies. Tax controversies also arise when the IRS invokes specific rules in an attempt to collect one taxpayer's tax from a third party (such as an employee). In addition to income taxes, tax controversies can arise when a taxpayer fails to submit gift and estate taxes (taxes required to be paid upon the making of certain gifts or leaving money or property to others upon death) or various excise taxes (taxes required to be paid upon the buying or selling of certain products or services). Substantial tax controversies also arise when employers fail to withhold or pay to the IRS employment taxes (various taxes on monetary and other compensation employers pay to their employees). Tax controversies can also arise when a state in the USA (rather than the IRS) asserts that a taxpayer owes additional tax or has not fulfilled its tax obligations to that particular state.

1.2 Causes of Tax Controversies

Measured by aggregate dollar amounts at issue, individual income taxes generally give rise to the most tax controversies. According to the IRS's 2019 fiscal year report, there is a projected aggregate USD381 billion income "tax gap" – the amount of tax due but not yet paid. Of that amount, USD271 billion (more than 70%) relates to taxes due from individuals, USD77 billion (more than 20%) relates to taxes due from employers, USD32 billion (nearly 8.4%) relates to taxes due from corporations, and USD1 billion (less than 1%) relates to taxes due from estates.

However, measured by dollar amounts at issue in each case, tax controversies with a small number of entities (often corporate taxpayers or partnerships) tend to give rise to the most substantial and contentious income tax controversies. For example, in its most recently submitted budget request, the United States Tax Court reported that it had cases with an aggregate of USD18 billion of tax deficiencies pending before it. Of those, a relatively small number of cases comprised the most sizeable controversies:

- 157 related to tax deficiencies of USD10 million to USD100 million;
- 15 related to tax deficiencies of USD100 million to USD500 million;
- six related to tax deficiencies of USD500 million to USD1 billion; and
- one related to a tax deficiency of USD1 billion to USD10 billion.

1.3 Avoidance of Tax Controversies

The best way to attempt to mitigate possible tax controversy is to pursue upfront compliance. Taxpayers most commonly accomplish this by relying on, and co-operating with, one or more advisors (accounting firms or tax lawyers) well before filing a tax return. Advisors help taxpayers compile and understand the relevant tax laws and apply them to taxpayers' factual

circumstances. Of course, even if a taxpayer fully pursues upfront compliance, the IRS may disagree with the taxpayer's position and controversy may ensue.

Where applicable, the IRS has certain mechanisms to enable an upfront agreement between a taxpayer and the IRS and thereby avoid future controversy. Such IRS mechanisms include:

- a private letter ruling (a written statement issued by the IRS to a taxpayer that applies the tax law to the taxpayer's specific facts);
- an advance pricing agreement (an agreement between a taxpayer and the IRS (and potentially other governments as well) with respect to the proper pricing of intercompany transactions including those involving goods, services, and/or intangibles); and
- for certain business taxpayers, the Compliance Assurance Process (a programme where the IRS and a taxpayer work together to resolve potential issues prior to the filing of a tax return).

Other avenues to mitigate possible tax controversies include pursuing pre-filing agreements (agreements between the IRS and certain large business taxpayers that resolve the treatment of certain transactions before a tax return is submitted) and obtaining a closing agreement or accelerated issue resolution agreement for an issue addressed and resolved in a prior IRS examination that might arise again in later tax years.

1.4 Efforts to Combat Tax Avoidance

Certain of the OECD's base erosion and profit shifting (BEPS) reports were addressed through aspects of the Tax Cuts and Jobs Act (TCJA) in 2017. For instance, the TCJA included provisions attempting to:

- neutralise the effects of hybrid mismatch arrangements (BEPS Action 2);
- design effective controlled foreign company rules (BEPS Action 3); and
- limit base erosion involving interest deductions (BEPS Action 4).

The law also contains a global anti-base erosion proposal that influenced recent proposals from the OECD regarding the tax challenges of the digitalisation of the economy. These new provisions may well increase tax controversies in the USA in the next several years.

However, while the USA supports and participates in the discussions at the OECD regarding the international tax system, it has generally opposed digital services taxes and departures from arm's-length transfer pricing and taxable nexus standards.

In recent years, the IRS has also increased its network of tax information–exchange agreements and made greater use of the information-exchange aspects of tax treaties. Exchange of information in the cross-border context has generated additional tax controversies in the USA. The IRS has also implemented country-by-country reporting requirements for certain large multinational businesses. While these disclosure rules may not increase tax controversies, they will arguably enable the IRS and foreign authorities to pursue perceived tax avoidance in a more targeted fashion.

1.5 Additional Tax Assessments

If the IRS audit function determines that a taxpayer owes additional tax, the taxpayer need not pay the additional tax before challenging the audit determination. Taxpayers have the potential ability to challenge the IRS's determination administratively at the IRS's Office of Appeals, as described in **3. Administrative Litigation**. Failing administrative resolution, taxpayers

can challenge the IRS's determination in court, as described in **4. Judicial Litigation: First Instance**. Generally, if a taxpayer is ultimately determined to owe additional tax, the IRS formally "assesses" the tax due at that time. Interest on the additional tax runs from the due date of the taxpayer's tax return for the year at issue.

However, taxpayers can stop the running of interest on an asserted tax deficiency by first paying the additional tax that the IRS claims is owed and then submitting an administrative claim for a refund with the IRS. If the IRS denies a taxpayer's refund claim, then the taxpayer can sue the USA for a refund, as described in **4. Judicial Litigation: First Instance**.

2. TAX AUDITS

2.1 Main Rules Determining Tax Audits

The IRS determines whose returns it will audit based on a number of criteria, some driven by particular enforcement initiatives. For the past several years, multinational enterprises – regardless of whether their businesses are conducted through corporations, partnerships, or as individuals – have received the most scrutiny by the IRS. Transfer pricing issues, the use of intercompany debt, and the cross-border transfer of intangibles are among the issues that have garnered the highest scrutiny. On a regular basis, the IRS issues a public list of "campaigns" or "particular issues" that will receive heightened attention and for which additional IRS resources will be dedicated. Today, how taxpayers have complied with the new provisions of the Tax Cuts and Jobs Act of 2017 (the TCJA) is an increasing area of IRS focus.

Many large companies are under continuous audit by the IRS. This means that the IRS quite literally has a "permanent" office on a company's premises from which to conduct its audit. Audits are typically in two or three-year "cycles," with the goal of being as current as possible. The IRS's "Compliance Assurance Process" is designed to allow large-case taxpayers with the best records of compliance to have their tax positions reviewed and, ideally, approved by the IRS even before the tax returns are filed. These "real time" audits come with benefits and challenges, but allow taxpayers to know the IRS's views at the time of filing their returns.

For individuals, high-net-worth or otherwise, the IRS looks for signs of non-compliance, often through automated tools that allow it to compare an individual's reported income with the payments that employers or investment funds or others make to the taxpayer. By this comparison, the IRS can determine if there is a mismatch in the income reported by a taxpayer and the payments reported by these other parties. For many taxpayers, this mismatch is the surest way to cause the IRS to start a "paper audit" of the taxpayers' returns to determine compliance.

2.2 Initiation and Duration of a Tax Audit

Typically, the IRS must commence an audit of a timely filed tax return and assess any additional taxes within three years of the return's filing date. This limitations period may be extended by the agreement of both the taxpayer and the IRS. The commencement of an audit does not suspend this "statute of limitations". Therefore, this three-year period is the only time constraint on the IRS to conduct an audit.

Depending on the complexity of the audit and the willingness of the taxpayer to afford the IRS more time, corporate taxpayers generally agree to extend this period to allow the IRS to complete its audit and, hopefully, to reach an agreement with the IRS about any potential adjustments. It is not unusual for complex audits of multinational companies to take two to three years to

complete with the limitation period having been extended by agreement for five or more years after the original expiration date. If, following an audit, the taxpayer and the IRS have been unable to reach an agreement as to disputed issues on the taxpayer's return, the statute of limitations can and often will be further extended by agreement to allow the taxpayer to proceed to various administrative dispute-resolution forums such as IRS Appeals (discussed in **3. Administrative Litigation** and **6. Alternative Dispute Resolution (ADR) Mechanisms**).

2.3 Location and Procedure of Tax Audits

The IRS will generally conduct the tax audit of a business or corporation "on site" at the company's headquarters. The IRS often conducts audits of individuals through the mail and telephone calls. The IRS's data gathering is mostly conducted through requests for information called "Information Document Requests", which seek written answers to questions, printed documents, and electronic data. Today, most information is transmitted to the IRS auditors electronically. The IRS may also seek interviews from people with knowledge of specific information within the company as well as from third parties, such as customers of the company, in the appropriate circumstances. The IRS also may seek "tours" of the company's facilities if useful to its examination. Interviews may be conducted informally without the taxpayer's or the IRS's counsel present. Or, they may be conducted more formally, with counsel involved and the interviewees' statements transcribed.

If there is a dispute between the IRS and the person or entity from whom it is seeking information or documents about the propriety of the requests, the IRS may issue an administrative "summons," which is a more formal request for information. If the recipient refuses to comply with the summons, the IRS may seek to "enforce" the summons by commencing an action in a federal district court. Such actions happen infrequently and usually occur only after all other opportunities to reach an agreement with the IRS have failed.

2.4 Areas of Special Attention in Tax Audits

As discussed in **2.1 Main Rules Determining Tax Audits**, the IRS annually publishes a list of its priority areas for enforcement, which it now calls "campaigns." There are currently nearly 50 campaigns in addition to other enforcement issues, including those arising out of the TCJA. For multinational taxpayers, the IRS has historically focused and continues to focus on transfer pricing issues, as well as, for example, those issues arising out of supply chain restructurings, cross-border acquisitions, worthless stock losses, and transactions that seek to maximise the tax effects of business losses.

In transfer pricing audits particularly, among the first requests for information that the company will receive, after a request for access to the company's electronic books and records that support its tax returns, is a request for the company's transfer pricing documentation, which must be provided within a statutory period of time in order to ensure its use as "penalty protection" under the Internal Revenue Code. Transfer pricing issues can relate to the provision of cross-border services and tangible goods, the licensing of intangibles, intercompany debt, and manufacturing and distribution activities. The IRS has often identified these types of cross-border issues as priorities for civil investigation and enforcement because the tax effect of the IRS's adjustments can be in the hundreds of millions of dollars.

2.5 Impact of Rules Concerning Cross-Border Exchanges of Information and Mutual Assistance Between Tax Authorities on Tax Audits

For the past several years, as countries have been more willing to utilise treaties and other information-sharing arrangements between them, the IRS has issued a growing number of requests for information on behalf of other countries. Likewise, the IRS has been gaining access to a greater amount of information from other jurisdictions than ever before. Taxpayers are also only beginning to see the effect of "country by country" transfer pricing documentation. This information exchange has made it that much more important for taxpayers to co-ordinate their global responses to taxing authorities' requests to ensure that they remain cognisant of how different jurisdictions might use or interpret that information. The "global controversy" position within companies has become increasingly important as a result. In the USA, however, this information exchange has not yet led directly to a material increase in IRS audit activity. Whether the increased co-operation among taxing authorities will affect this over time is to be determined.

2.6 Strategic Points for Consideration During Tax Audits

As taxpayers prepare themselves to manage an IRS audit, there are three key initial considerations. First, before a taxpayer even files its tax return, it should identify those areas where it would expect a potential disagreement. This will allow a taxpayer to ensure that it has the documentation and facts and analysis it will need already in place once the IRS begins asking questions during the audit. In addition, it might allow the taxpayer to seek an advanced ruling from the IRS (such as a "private letter ruling" or an "advanced pricing agreement") that may allow it to avoid the dispute altogether.

Second, once the audit commences, which normally will be at least a year or two after the tax return has been filed, the taxpayer should re-evaluate the merits of its position given how the law and the IRS's view of it may have changed. The taxpayer should then determine the amount of the potential exposure for both tax and financial purposes so that it can assess the materiality of the issue accordingly. Finally, if the IRS disagrees with the taxpayer's position, the taxpayer should assess the adequacy of its documentation to help protect itself from civil penalties.

Third, through the course of the audit, the taxpayer should endeavour to maintain control over the factual record. The taxpayer is the one that knows the facts (or should), and the IRS is seeking to learn them. So, the taxpayer must always consider whether it has mastered the facts and is able to answer the IRS's questions. A taxpayer does not want to be in the position of learning facts at the same time as the IRS does.

Perhaps the most important "asset" a taxpayer has at its disposal during an IRS audit, however, is its credibility. Taxpayers must answer questions truthfully, stand by their commitments to the IRS for responses and information, and ensure that any representation they make can be proven if necessary. Developing a respectful and credible relationship with the IRS examiners may contribute significantly to ensuring that the audit proceeds in a timely, efficient, and, ideally, successful manner.

3. ADMINISTRATIVE LITIGATION

3.1 Administrative Claim Phase

IRS Appeals and Tax Court Litigation (Pre-Assessment)

Before the IRS notifies a taxpayer of an additional tax assessment, the taxpayer has options to resolve its tax liability without filing an administrative refund claim. Upon receiving a final examination report and a "30-day letter," a taxpayer may pursue an administrative appeal by filing a protest and requesting a conference with the Office of Appeals, the arm of the IRS responsible for settling tax cases on their merits before litigation. IRS Appeals procedures are outlined below in **6.1 Mechanisms for Tax-Related ADR in this Jurisdiction** and **6.2 Settlement of Tax Disputes by Means of ADR**.

If the taxpayer does not respond to the 30-day letter, the taxpayer loses its administrative-appeal rights and the IRS will issue a statutory notice of deficiency. A taxpayer normally has 90 days to file a petition with the United States Tax Court to redetermine the deficiency asserted in the notice of deficiency. Tax Court litigation is outlined in **4. Judicial Litigation: First Instance**. A Tax Court litigant who has not previously pursued an administrative appeal before IRS Appeals can be given the opportunity for IRS Appeals review during litigation.

If the taxpayer does not pursue either an administrative appeal or Tax Court litigation, the IRS may make an "assessment" to fix the additional amount owed by the taxpayer, after which the taxpayer must engage in the administrative claim phase if it still seeks to contest the assessment.

Administrative Claim Phase (Post-Assessment)

Once the IRS issues a notice of assessment and demands payment from a taxpayer, the administrative claim phase becomes mandatory before initiating refund litigation in either a United States district court or the United States Court of Federal Claims. This phase gives the IRS notice of the claim and the facts on which it is based so that it may consider the matter and correct any errors. However, as a practical matter in most cases, the administrative claim phase is largely procedural and does not permit the taxpayer a hearing or other adjudicative vehicle, or provide a meaningful opportunity to have the IRS's initial decision reconsidered.

An administrative claim must generally be filed within the later of three years from the time the original return was filed, or two years from the time the tax and/or penalty was paid. A refund claim is usually made on an amended return and filed with the IRS office where the taxpayer submitted its original return, and must contain each ground on which a refund is claimed and all relevant facts.

The IRS may accept, deny, or examine a claim. If a claim is examined, the procedures are similar to an IRS audit of an original tax return, including the ability to file an appeal of a denial with IRS Appeals. However, if a taxpayer seeks a refund based only on contested issues considered in previously examined returns and does not want to appeal within the IRS, it can request in writing that the claim be immediately rejected.

3.2 Deadline for Administrative Claims

There is no deadline for the IRS to decide an administrative claim filed by a taxpayer. If the claim is denied, the IRS will mail a notice of claim disallowance to the taxpayer. A taxpayer has two years from the date of the IRS's mailing of this notice to file a refund suit in a United States district court or in the United States Court of Federal Claims. Alternatively, if the IRS does not render a decision on the claim within six months

after its filing, the taxpayer may file suit in one of those courts at any time.

4. JUDICIAL LITIGATION: FIRST INSTANCE

4.1 Initiation of Judicial Tax Litigation

Tax litigation in the USA is usually initiated through either of two channels: deficiency litigation and refund litigation. The law generally requires the IRS to issue a taxpayer a document called a notice of deficiency before the IRS can record a tax debt against the taxpayer and seek to collect the tax. The notice of deficiency allows the taxpayer to petition the United States Tax Court and challenge the asserted tax before paying the tax.

If the taxpayer does not file a Tax Court petition in response to a notice of deficiency, then the IRS can assess and seek to collect the tax. In that case (or if the taxpayer pays the tax before receiving a notice of deficiency), the taxpayer is limited to seeking a refund after it pays the tax. This requires that the taxpayer first file a claim for refund with the IRS. If the IRS does not respond to the claim for refund within six months or denies the claim for refund, then the taxpayer can file a lawsuit seeking a refund in a federal district court or the United States Court of Federal Claims. The taxpayer cannot file a refund suit in the Tax Court, though the Tax Court is empowered to order a refund for a period over which it possesses deficiency jurisdiction.

There are different procedures for partnerships and taxpayers filing for bankruptcy. There are also separate procedures for special kinds of case, including those involving collection and interest abatement.

4.2 Procedure of Judicial Tax Litigation

Whether in the Tax Court or a refund forum, tax litigation involves a pretrial discovery and motion phase, a trial phase, and a post-trial briefing and decision phase.

The Tax Court requires informal discovery and emphasises a stipulation process in which the parties agree to everything relevant and not in dispute. Discovery in the refund forums tends to be formal, and stipulations are less common.

The Tax Court will issue an opinion after the post-trial briefing. In most cases, a process follows the opinion in which the parties submit agreed or unagreed computations to the Court. The Tax Court then issues a decision that reflects the amount of tax owed. The Tax Court will not consider new issues during this phase.

In the refund forums, the court issues an opinion that reflects the court's factual and legal conclusions. If the court orders a refund, then the court might seek the parties' input into the tax and interest computations by requiring status reports or a joint motion for entry of final judgment. A case is concluded by the entry of a final judgment reflecting the outcome.

4.3 Relevance of Evidence in Judicial Tax Litigation

Documentary and witness evidence are relevant in practically all civil tax litigation. A taxpayer must produce documents in response to discovery requests whether or not those documents were produced during the underlying audit. The IRS and the US Department of Justice (DOJ) can also subpoena documents in connection with a deposition or trial.

Fact and expert witness depositions are available in the Tax Court and the refund forums, but depositions are less common in the Tax Court.

Direct and cross-examination of fact and expert witnesses are common in all civil tax litigation.

Expert witness reports are common in larger tax litigation. In the Tax Court, the parties exchange expert witness reports and submit them to the Court prior to trial. At trial, the Tax Court will admit the expert reports into evidence, and those reports will serve as the experts' direct testimony. The Tax Court will sometimes allow limited additional direct testimony by experts. In the refund forums, the courts typically do not admit expert reports into evidence, and experts provide direct testimony that summarises their expert opinions.

4.4 Burden of Proof in Judicial Tax Litigation

The taxpayer bears the burden of proof in all civil tax litigation unless exceptional circumstances apply (eg, the IRS alleges fraud or raises a new issue not raised in the pleadings). The USA always bears the burden of proof in criminal tax cases.

4.5 Strategic Options in Judicial Tax Litigation

As noted in **4.1 Initiation of Judicial Tax Litigation**, a taxpayer can generally choose whether to contest the tax in Tax Court, before paying, or in a refund forum (a federal district court or the United States Court of Federal Claims), after paying the tax and filing an unsuccessful administrative refund claim. Whether to contest the tax before paying or pay first and sue for a refund is an important strategic option for a taxpayer deciding whether to litigate in Tax Court or a refund forum.

There are a variety of other factors that could influence a taxpayer's choice of whether to litigate in the Tax Court or a refund forum. Those factors include the applicable judicial precedent in the relevant forum, which could differ, and timing to the commencement of litigation. A taxpayer has far more control over when to initiate refund litigation than Tax Court litigation. If a taxpayer has not pursued an administrative appeal before the IRS, then the taxpayer would also want to consider whether to pursue an administrative appeal after docketing the case. Such a route is possible in the Tax Court but not in the refund forums. There are various other factors to consider, including the judges and government lawyers in the different forums and differences in the different forums' procedural rules.

All taxpayers will have to consider some common strategic options regardless of whether they choose to litigate in the Tax Court or a refund forum. These options include whether to file pretrial motions to try to dispose of some or all of the case, whether to offer expert testimony, and whether and when to initiate settlement discussions.

4.6 Relevance of Jurisprudence and Guidelines to Judicial Tax Litigation

Jurisprudence is always relevant in tax litigation in the USA, although its effect differs depending on the type of jurisprudence. The Tax Court is bound by its own precedent and that of the appellate court to which the decision in the case would be appealed. The Tax Court is not bound by the jurisprudence of the refund forums but would look to such jurisprudence and could adopt the reasoning if the Tax Court finds it persuasive. Similar to the Tax Court, the refund forums are bound by the precedent of the appellate court to which the decision in the case would be appealed. They are not bound by the Tax Court's jurisprudence or that of the other refund forums but tend to look to it for guidance.

In international tax cases, the courts would look to double-tax treaties and international guidelines to the extent relevant. Treaties have the force and effect of law and are binding on the

courts. Guidelines such as the OECD Transfer Pricing Guidelines do not bind the courts, which would instead look to the US transfer pricing regulations. But the parties can reference the OECD Transfer Pricing Guidelines, and the courts could look to them for guidance and persuasiveness. The same is true of foreign court opinions.

Academic opinions and articles never bind courts, although parties should cite them if relevant and helpful. Courts often look to such materials for guidance and cite them in opinions.

5. JUDICIAL LITIGATION: APPEALS

5.1 System for Appealing Judicial Tax Litigation

Appeals from opinions of the Tax Court, a federal district court, or the Court of Federal Claims are first made to one of 13 Circuit Courts of Appeal located across the USA. These appeals can typically be made as a matter of right. A further appeal from an opinion of one of the Circuit Courts can be made to the United States Supreme Court. However, the Supreme Court does not have to accept such an appeal and, as a practical matter, rarely grants appeals in tax cases. Whether the Supreme Court accepts an appeal depends on various factors – such as whether Circuit Courts disagree about the issue being appealed and the degree to which the question is one of public importance.

Appeals from the Court of Federal Claims are made to the United States Court of Appeals for the Federal Circuit. Generally, appeals from Tax Court decisions are made to the Circuit Court for the circuit in which the taxpayer has its principal place of business or principal office or agency (or if the taxpayer is not a corporation, where the taxpayer's legal residence is located). An appeal from a district court decision is generally made to the Circuit Court covering the district where the district court is located. As noted above, any further appeal is made to the Supreme Court.

5.2 Stages in the Tax Appeal Procedure

The stages in a tax appeal procedure are generally similar to the process for appealing other types of cases. First, there are deadlines within which a party must appeal a case (typically 60 days after the entry of judgment in district court and Court of Federal Claims cases, and 90 days after the entry of decision in Tax Court cases).

Second, once a case has been appealed to a Circuit Court, the Circuit Court generally issues a schedule with deadlines by which each party – the taxpayer and the government – must submit written briefs arguing the issues being appealed. Cases on appeal are generally decided by a group of three judges. After the parties file their briefs, in some cases the three judges will hear oral argument from the parties. After briefing concludes and, if applicable, oral argument, the three judges will decide the issue on appeal. Generally, a Circuit Court will affirm the lower-court decision, reverse the lower-court decision, or send the case back (remand) to the lower court to decide additional factual or legal issues. On rare occasions, the decision of a three-judge panel will be formally reviewed en banc by all of the full-time judges of the particular Circuit Court.

Finally, a party can generally request a further appeal to the Supreme Court within 90 days after entry of a judgment in the Circuit Court. Generally, the parties can submit written briefs encouraging (or discouraging) the Supreme Court from accepting the appeal. If the Supreme Court accepts the appeal, the parties submit written briefs arguing the issues being appealed. The Supreme Court also commonly, but not always, hears oral argument.

5.3 Judges and Decisions in Tax Appeals

As noted in **5.2 Stages in the Tax Appeal Procedure**, appeals to a Circuit Court are typically decided by a panel of three judges. The total number of judges for each Circuit Court varies. Generally, while most Circuit Courts have more than ten judges, some have more than 25 judges. In rare cases, after the decision of a three-judge panel, an appeal might be further heard by all of a Circuit Court's full-time judges – a so-called en banc review.

The Supreme Court has nine justices. Generally, all nine participate in cases in which the Supreme Court grants an appeal.

All Circuit Court judges and Supreme Court justices have life tenure. They are appointed by the president of the USA and approved by the United States Congress.

Notably, unlike judges on the Tax Court, most Circuit Court judges and Supreme Court justices are not necessarily experts in tax law. Their legal backgrounds and expertise are often in another subject matter.

6. ALTERNATIVE DISPUTE RESOLUTION (ADR) MECHANISMS

6.1 Mechanisms for Tax-Related ADR in this Jurisdiction

Traditional IRS Appeals

The principal ADR mechanism for federal taxes in the USA is IRS Appeals, which is the arm of the IRS responsible for resolving tax controversies without litigation on a basis that is fair and impartial to both the government and the taxpayer. A taxpayer who disagrees with adjustments proposed by IRS Examination has the option, but is not required, to pursue an administrative appeal to IRS Appeals. Ordinarily, a taxpayer must request an appeal and lodge a formal protest within 30 days of receiving a "30-day letter" and the final examination report. In many cases IRS Examination prepares a rebuttal to the protest, after which the case is transferred to IRS Appeals for settlement negotiations.

Special ADR Programmes

ADR mechanisms exist to involve IRS Appeals at different points in the process to facilitate a negotiated resolution. Under the Fast-Track Settlement (FTS) programme, the taxpayer and IRS examiners may mediate a dispute before an appeals officer while the case remains under IRS Examination jurisdiction. The Early Referral programme allows large corporate taxpayers to ask IRS Examination to refer disputed but fully developed issues to IRS Appeals while the audit team continues to work on other issues.

The Rapid Appeals Process (RAP) is an ADR procedure in which IRS Appeals can bring IRS Examination and a large business taxpayer together early in the appeals phase to attempt to resolve an issue and thereby shorten the normal IRS Appeals timeline. Finally, if IRS Appeals and the taxpayer cannot reach a settlement, Post-Appeals Mediation (PAM) is available for many types of cases and may be used as a "last shot" to avoid litigation.

Court ADR Procedures

Once in the judicial phase, taxpayers and the IRS can pursue ADR mechanisms in the same way as any other civil litigants. Most courts have rules that allow the parties to engage in court-supervised arbitration or mediation, and many courts require the parties to engage in a mediation procedure before trial.

6.2 Settlement of Tax Disputes by Means of ADR

Traditional IRS Appeals

In a typical administrative appeal, an IRS appeals officer reviews the parties' written submissions and, after a "preconference" with IRS Examination, holds one or more conferences with taxpayer representatives in an attempt to settle the case. Appeals officers are expected to act independently from IRS Examination and in a quasi-judicial manner. Appeals conferences are informal to promote frank discussion and mutual understanding. After considering the parties' positions, appeals officers may reject either party's position entirely or propose a settlement based on the hazards of litigation.

Special ADR Programmes

In an FTS proceeding, an IRS appeals officer acts as a mediator and helps the parties resolve factual or legal issues but cannot compel a settlement. If agreement is reached, IRS Appeals will exercise its settlement authority and effect the settlement. If no agreement is reached, the taxpayer may later protest the Fast-Track issues to IRS Appeals. In an Early Referral case, IRS Appeals can exercise its settlement authority to settle the Early Referral issue. Unresolved issues are returned to IRS Examination. If the case is later protested, those issues will not be reconsidered by IRS Appeals. In the RAP, the IRS appeals officer serves as a mediator and uses their settlement authority to effect any settlement reached. In a PAM, a different IRS appeals officer acts as a mediator between the taxpayer and the original IRS appeals officer. In addition, the taxpayer may elect to involve a private co-mediator at its own expense. The mediation is non-binding. If agreement is reached, IRS Appeals will use its authority to effect the settlement.

6.3 Agreements to Reduce Tax Assessments, Interest or Penalties

A settlement reached with IRS Appeals under any of the ADR procedures described in **6.1 Mechanisms for Tax-Related ADR in this Jurisdiction** may be used to reduce the amount of taxes or penalties asserted by IRS Examination and any related interest charges.

6.4 Avoiding Disputes by Means of Binding Advance Information and Ruling Requests

A taxpayer may seek guidance on the proper tax treatment for a particular item in the form of a pre-filing agreement (PFA) between the IRS and the taxpayer or by requesting a private letter ruling (PLR) or technical advice memorandum (TAM) from the IRS National Office.

The PFA programme allows a taxpayer to request consideration of an issue before the tax return is filed and thus resolve potential disputes and controversy earlier in the examination process. PFAs can cover the current and up to four future tax years, but the transaction must be complete.

They may also be used to determine the appropriate methodology for determining tax consequences affecting future tax years and are available for international issues. PFAs require a USD174,000 user fee and typically take more than a year to complete.

Before filing a tax return, a taxpayer may seek a PLR applying federal tax law to the taxpayer's facts. A PLR binds both the IRS and the requesting taxpayer but may not be relied on as precedent by other taxpayers. A TAM is similar to a PLR, but it deals with a completed transaction rather than a proposed transaction and is typically obtained during the course of an IRS examination.

In appropriate cases, PFAs, PLRs, and TAMs can be effective devices to remove uncertainty concerning the application of federal tax law to a significant transaction. However, advance rulings are expensive, time-consuming, and not advisable in all cases, such as where the law is relatively clear, time is of the essence, or there is a significant risk of an adverse ruling.

6.5 Further Particulars Concerning Tax ADR Mechanisms

With very limited exceptions, the IRS Appeals Office has jurisdiction over all types of tax claims regardless of the amount involved. However, IRS Appeals may refer a case to IRS Examination where a new issue is raised or additional fact-finding is required to resolve the case. In addition, in exceptional cases the IRS National Office can preclude IRS Appeals review by designating a case for litigation where it involves significant issues affecting a large number of taxpayers or determining that IRS Appeals consideration is inconsistent with sound tax administration.

There is no deadline for a decision by IRS Appeals. However, if the expiration of the statute of limitations on assessment becomes imminent and no statute extension can be obtained from the taxpayer, IRS Appeals will terminate the appeal and issue a statutory notice of deficiency.

In large cases, the issues may be divided among a team of appeals officers, some of whom may be specialists such as engineers, economists, appraisers, or subject-matter experts. The team will be led by an appeals team case leader (ATCL), who has ultimate settlement authority.

Appeals officers are expected to resolve issues with strict impartiality as between the taxpayer and the government and consistently as between similarly situated taxpayers. IRS Appeals settles cases based solely on the hazards of litigation, considering existing legal precedent and the taxpayer's particular facts, and does not take considerations of equity or public policy into account.

6.6 Use of ADR in Transfer Pricing and Cases of Indirect Determination of Tax

The ADR mechanisms are available to settle disputes arising under transfer pricing cases. Alternatively, where a transaction may result in double taxation in the USA and another country, and those countries have entered into a tax treaty containing a Mutual Agreement Procedure (MAP), the taxpayer may invoke its rights under that treaty to seek the assistance of the US competent authority (or foreign competent authority in some treaties) to alleviate that double taxation. If the MAP does not produce an acceptable resolution, the taxpayer may pursue all available domestic remedies, including the ADR mechanisms described throughout **6. Alternative Dispute Resolution (ADR) Mechanisms**. IRS Appeals has jurisdiction over certain types of indirect excise taxes assessable by the IRS.

7. ADMINISTRATIVE AND CRIMINAL TAX OFFENCES

7.1 Interaction of Tax Assessments with Tax Infringements

Most taxpayer disagreements with the IRS do not rise to the level of criminal offences. When the IRS believes that a taxpayer has particularly poor support for the positions taken on a tax return or has understated its taxable income by significant amounts, the primary tools the IRS uses to deter this behaviour are civil penalties for negligent filing of tax returns or for substantially understating taxable income. Even when the behaviour is particularly extreme, the IRS will primarily use civil penalties (up to 40% of the underpayment of tax, for example) to "punish" the taxpayer. If a taxpayer is alleged to have committed civil fraud by, for example, grossly

overstating a deduction, then the statute of limitations for the IRS to assess the penalty remains open indefinitely. While the US tax system does not technically have a general anti-abuse rule (GAAR) or a specific anti-avoidance rule (SAAR), it does have anti-abuse provisions that oblige a taxpayer not to engage in "abusive" tax avoidance behaviour, and civil penalties are used accordingly.

Taxpayers will find themselves subject to criminal investigations and fines and potential imprisonment, however, for the most egregious conduct and for the wilful failure to pay tax. Wilful failures to report the right amount of taxable income, fraudulent tax returns, and obstruction of an IRS investigation are the types of conduct that lead the IRS to refer matters to its Criminal Investigation Division (CID). The CID will initiate matters in a number of ways: a referral from the IRS civil tax auditors; a referral from other governmental agencies; as a result of information provided by private citizens; or as part of a CID enforcement effort or initiative. The DOJ may initiate its own tax-related criminal investigation as well, seeking the assistance of the CID, which is the agency responsible for criminal tax investigations. Once a criminal investigation is "opened," civil tax investigations are typically suspended.

7.2 Relationship Between Administrative and Criminal Processes

As described in **7.1 Interaction of Tax Assessments with Tax Infringements**, some criminal tax matters arise as a referral from the IRS while conducting a civil tax examination; others arise independently. Once a criminal tax investigation has been started, the civil tax examination is typically suspended. Upon the completion of the criminal tax investigation, the matter is often referred back to the IRS's civil tax examiners to determine their own adjustments and impose their own penalties. If criminal charges are recommended, the case will be referred to the DOJ for potential prosecution. A taxpayer may, therefore, find itself subjected to both criminal charges and fines and civil tax penalties, in addition to an increased tax liability and interest.

7.3 Initiation of Administrative Processes and Criminal Cases

Once the CID determines that a case is appropriate to pursue, the matter is referred to the DOJ, Tax Division, which, along with the US Attorney's offices, is responsible for prosecuting the case. In civil tax proceedings, the taxpayer has the "burden" to show in federal court by a "preponderance of the evidence" that the IRS's position is wrong. In a criminal tax matter, however, the DOJ has the burden to show that the taxpayer is guilty "beyond a reasonable doubt." Also, unlike in civil tax matters, only federal district courts have jurisdiction over criminal cases, which may be decided by a judge or a jury. Criminal cases cannot be brought to or heard by the US Tax Court or the US Court of Federal Claims, which both conduct "bench" (judge) trials only.

7.4 Stages of Administrative Processes and Criminal Cases

Upon the matter being referred to the CID for investigation, the stages of the criminal tax process are generally as follows:

- initial investigation by the CID;
- special agent report (SAR), recommending criminal investigation;
- review by the special agent-in-charge (SAC) of the CID, who, if in agreement, refers the matter to the DOJ or the US Attorney's office;
- review by the DOJ and assignment to an Assistant US Attorney;
- referral to a grand jury to assist the Assistant US Attorney in its investigation and, if appropriate, to approve indictments (criminal charges) against the taxpayer;

- once indictments are issued, the taxpayer is "arraigned" by a federal district court to explain to the taxpayer the charges being brought and to ask for its plea (guilty or not guilty);
- from this stage, the government and the taxpayer enter into plea bargaining negotiations and pretrial proceedings;
- if a plea bargain cannot be reached, then the taxpayer must proceed to trial, typically a jury trial;
- if found guilty, the taxpayer may be subject to fines, imprisonment, or both; and
- once a final judgment is rendered, the taxpayer or the government may appeal the decision to the federal appellate court with authority over the federal district court where the matter was tried – see discussion in **5. Judicial Litigation: Appeals**.

7.5 Possibility of Fine Reductions

A taxpayer's paying the asserted tax, penalties, and interest will not bar a criminal tax prosecution, particularly if the taxpayer makes the payment after an investigation has been commenced. A taxpayer's wilful failure to pay the right amount of tax in the first instance will be the determining factor. A taxpayer's co-operation, including its payment of the asserted additional taxes, interest, and penalties, will be relevant, however, to a court if it is deciding the ultimate penalty to impose, such as a fine or imprisonment, or both.

7.6 Possibility of Agreements to Prevent Trial

As discussed in **7.5 Possibility of Fine Reductions**, simply paying the amount owed, plus interest and penalties, does not necessarily protect someone from criminal prosecution. Plea agreements are very useful, however, as a way to negotiate a reduction in fines or the amount of time in prison or even a waiver of prison time altogether. From the government's perspective, the ability to impose a hefty (and very public) fine with or without imprisonment may send the same enforcement message as a victory at trial and negates the risk of losing at trial. Likewise, if the taxpayer is able to negotiate a reduced sentence or fine, it too benefits, because it also avoids proceeding to trial, losing, and suffering an even greater penalty.

7.7 Appeals against Criminal Tax Decisions

Appeals from judgments in federal district court proceed in the same manner to federal appellate courts and the US Supreme Court, as described in **5. Judicial Litigation: Appeals**.

7.8 Rules Challenging Transactions and Operations in this Jurisdiction

While the wilful avoidance of tax can lead to a criminal tax investigation and charges, there have been few if any criminal tax cases brought against taxpayers who have had their tax returns challenged by the IRS or the DOJ under the anti-abuse or transfer pricing rules of the Internal Revenue Code. Promoters of overly aggressive "tax shelters," however, have been subjected to criminal tax charges for their roles in enticing taxpayers into engaging in transactions that are motivated solely by improper tax avoidance, rather than legally justifiable tax reduction.

8. CROSS-BORDER TAX DISPUTES

8.1 Mechanisms to Deal with Double Taxation

A United States taxpayer could pursue either a treaty mechanism or domestic litigation in a situation involving potential double taxation. But the treaty mechanism is the more prudent path if avoiding double taxation is the primary goal. This is because, when faced with a United States federal court's final determination of the

taxpayer's United States federal tax liability, the United States competent authority will entertain only a request for correlative relief from a foreign competent authority and will not otherwise endeavour to reduce or eliminate double taxation.

In circumstances not involving a final court determination, a taxpayer has more options. A taxpayer can seek assistance from the United States competent authority. Such assistance can take the form of a Mutual Agreement Procedure (MAP) request, or a unilateral, bilateral, or multilateral advance pricing agreement, depending on whether one taxing authority has already stated a claim that may give rise to double taxation and further depending on the transaction(s), affected jurisdiction(s), and treaty(ies) at issue.

Certain of the USA's bilateral income tax treaties also provide for mandatory arbitration if the competent authorities do not resolve double taxation issues within a specified period of time.

The USA has not signed the MLI and is not an EU member state governed by the EU Tax Disputes Directive.

8.2 Application of GAAR/SAAR to Cross-Border Situations

The USA does not have a general anti-avoidance rule (GAAR) that applies to cross-border situations or generally in tax cases. Although the USA's tax treaties do not contain a GAAR, they typically contain multiple specific anti-avoidance rules (SAARs) (ie, beneficial ownership, limitation on benefits, and limitation on residents).

While the USA does not have a GAAR per se, courts in the USA have developed multiple doctrines over decades to address abusive tax transactions. Chief among those doctrines is the economic substance doctrine, which is often the most important factor in applying a GAAR for countries that have one. The United States Congress codified the economic substance doctrine in 2010, and one could view that doctrine as the closest United States analogue to a GAAR.

Some statutes and regulations in the USA have specific anti-abuse or anti-avoidance provisions.

As noted in **8.1 Mechanisms to Deal with Double Taxation**, the USA has not signed the MLI.

8.3 Challenges to International Transfer Pricing Adjustments

In the USA, many international transfer pricing adjustments have been challenged by invoking the mutual agreement procedure in the applicable treaty. Some important transfer pricing disputes have been challenged in the domestic courts, primarily the United States Tax Court.

8.4 Unilateral/Bilateral Advance Pricing Agreements

APAs are somewhat common. In 2020, taxpayers submitted a total of 121 APA applications. Of these, 15 were unilateral, 103 were bilateral, and three were multilateral.

In certain instances, taxpayers are required (or encouraged) to submit a pre-filing memorandum to the Advance Pricing and Mutual Agreement (APMA) programme before submitting their request for an APA. Generally, pre-filing memoranda contain material relevant to a potential APA request. Similarly, taxpayers are sometimes required (or encouraged) to meet with representatives of the APMA programme before submitting an APA request. The meeting also covers information and topics relevant to a potential APA request including, if applicable, a discussion of a taxpayer's pre-filing memorandum.

Taxpayers who meet certain requirements initiate the APA process by submitting a request for an APA and paying a user fee. A taxpayer's APA

request contains a host of specified information relevant to the covered transaction(s) at issue and the taxpayer. After the request is submitted, the APMA programme contacts the submitting taxpayer with notification as to whether the request for an APA has been accepted, or for any additional required information. Once a taxpayer's request for an APA is complete, in most cases APMA representatives will hold an opening conference with the taxpayer. The opening conference generally entails a dialogue between the taxpayer and APMA representatives about questions and information relevant to the taxpayer's APA request. With respect to requests for bilateral or multilateral APAs, APMA representatives will consider requests from, and may invite or require, the taxpayer to provide joint presentations to APMA representatives and those of the foreign competent authority(ies). The APMA representatives will also consult as needed with any foreign competent authorities and generally keep taxpayers informed of the progress of negotiations.

If the terms of an APA are ultimately agreed upon, the APA becomes effective when executed by the taxpayer and the IRS. Thereafter, the taxpayer and the IRS take certain steps to monitor compliance with the APA. In very rare instances, the IRS might revoke or cancel an APA after its execution.

8.5 Litigation Relating to Cross-Border Situations

Transfer pricing has generated more substantial litigation in the USA over the past decade than any other cross-border issue. That trend continues. The recent lowering of the US corporate income tax rate, inclusion of a minimum tax, and adoption of provisions designed to incentivise "onshoring" of intellectual property could eventually mitigate transfer-pricing litigation, but that remains to be seen.

9. INTERNATIONAL TAX ARBITRATION OPTIONS AND PROCEDURES

9.1 Application of Part VI of the MLI to Covered Tax Agreements (CTAs)

Over 100 jurisdictions participated in negotiations on the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI). Although nearly 100 jurisdictions have signed onto the MLI to date, the USA has not.

According to Henry Louie, deputy internal tax counsel at the US Treasury, the USA did not opt into the MLI because the bulk of the MLI's provisions have been reflected in US tax treaty policy for decades. Specific to the arbitration provisions and Article 18, Louie explained that during the negotiations of the MLI, the USA had been potentially interested in creating arbitration provisions in a separate treaty-type instrument so that countries interested in arbitration, such as the USA, could adopt the arbitration provisions without signing onto the rest of the MLI. However, when the arbitration provisions were included in the MLI, the USA was not interested in signing onto the entire instrument.

In the USA, the 2016 US Model Income Tax Convention now includes a binding arbitration provisions that supplement MAPs. However, only a handful of US income tax treaties provide for mandatory binding arbitration. These provisions are applicable when the competent authorities have been unable to reach a complete agreement. Such arbitration clauses are included in the US income tax treaties with Belgium, Canada, France, Germany, Japan, Spain, and Switzerland.

9.2 Types of Matters That Can Be Submitted to Arbitration

Generally, for those US tax treaties that contain such a provision, the binding arbitration clause applies to situations where an agreement cannot be reached under a MAP. For binding arbitration to apply, generally, two years must have passed since a MAP was commenced and:

- the taxpayer must have filed tax returns with at least one of the contracting states;
- the case must involve the application of one or more articles of the income tax treaty;
- the competent authorities must agree that the case is suitable for determination by arbitration; and
- the taxpayer must agree to the release of their information to the arbitrators and agree to agree to treat the arbitration process as confidential.

Most of the bilateral treaties that include arbitration clauses also allow, typically through the memoranda of understanding or other similar implementing documentation, for APAs to be submitted for binding arbitration in certain circumstances. This expansion applies to the bilateral treaties with Canada, Belgium, Switzerland, Japan, and Germany.

9.3 Application of the Baseball Arbitration or the Independent Opinion Procedure

In the USA, cases are resolved by an arbitration board comprised of three members: each competent authority selects a single member, and those members select a chair from a list of candidates agreed upon by the competent authorities.

Generally, each competent authority must submit a proposed resolution with accompanying supporting papers. Using a "baseball-style" approach, the arbitration panel must then select one of the two proposed resolutions for each issue and inform both competent authorities of its determination.

9.4 Implementation of the EU Directive on Arbitration

The USA is not an EU member state and did not execute the MLI.

Beginning in 2013, the OECD and G20 countries have been working to close gaps in international tax rules that allowed for perceived opportunities for BEPS. Over the last few years, the OECD has developed two pillars that have proposed major changes to existing profit allocation and nexus rules and a global minimum tax rule.

To implement these pillars, the OECD is considering the creation of a new multilateral convention. Unlike the MLI, this new multilateral convention would apply between jurisdictions that do not currently have a bilateral treaty, supersede the relevant provisions of existing treaties concluded to eliminate double taxation, and contain all the international rules needed to implement the two pillars. The OECD has also proposed a vast dispute resolution mechanism, which would potentially include mandatory binding dispute resolution mechanisms that the new multilateral convention would likely incorporate.

9.5 Existing Use of Recent International and EU Legal Instruments

The USA has not signed the MLI or any EU legal instruments. And, as discussed in **9.6 Publication of Decisions**, because of the confidential nature of the decisions by an arbitration panel under US income tax treaties, any details about specific cases initiated or concluded are not released to the public and the USA does not publish any official data regarding the use of binding arbitration.

9.6 Publication of Decisions

Generally, all information provided to and all information received from the arbitration panel must remain confidential. Thus, the competent authorities must agree not to disclose any information relating to the panel, including the arbitration panel's determination, except in certain circumstances. Moreover, because the determinations are not binding, the arbitration panel does not always provide an explanation or analysis of the issues but only provides limited information necessary to implement the determination.

9.7 Most Common Legal Instruments to Settle Tax Disputes

Because the USA has not signed the MLI or any EU legal instruments, the most common legal instrument used are the US income tax treaties that include binding arbitration provisions.

9.8 Involvements of Lawyers, Barristers and Practitioners in International Tax Arbitration to Settle Tax Disputes

Generally, for US income tax treaties that contain an arbitration clause, the competent authorities deal directly with a three-member arbitration panel. Taxpayers or their representatives are not then involved.

10. COSTS/FEES

10.1 Costs/Fees Relating to Administrative Litigation

There is no "administrative litigation" in the USA, as all litigation is judicial. There is, however, an administrative appeals process before the IRS, as described in **3.1 Administrative Claims Phase**. There are no filing fees for pursuing an administrative appeal with the IRS's Office of Appeals. The costs of an administrative appeal depend on whether the taxpayer hires advisers, how extensive the issues are, and how long the process lasts.

10.2 Judicial Court Fees

There are small fees required to initiate litigation in the Tax Court and the refund forums. The taxpayer pays the fee. A low-income taxpayer can seek a filing-fee waiver. There is also a small filing fee for filing a judicial appeal. The taxpayer has to pay the filing fee if initiating the appeal. The fee for initiating an appeal is paid to the trial court with which the notice of appeal is filed. The government is generally exempt from fees and does not have to pay a filing fee if it initiates an appeal.

In limited instances, a taxpayer that prevails against the government can seek an award of litigation fees (including attorneys' fees). Various limitations restrict the taxpayers eligible for such relief.

10.3 Indemnities

The IRS is not required to indemnify a taxpayer if the IRS's position is ultimately rejected in an administrative or judicial proceeding. In limited circumstances, the taxpayer can seek to recover from the IRS the costs and fees incurred by the taxpayer in contesting the IRS's adjustment. In refund proceedings, the taxpayer is entitled to statutory interest on the amount of tax it is determined to have overpaid.

10.4 Costs of Alternative Dispute Resolution

There are large user fees associated with ADR–type programmes used to avoid litigation. An example is an advance pricing agreement, which is used to avoid transfer pricing disputes. The current user fee for filing a new advance pricing agreement request is USD113,500. The user fees for renewals and amendments are lower.

ADR is rare once a case is docketed in Tax Court. The Tax Court Rules provide for voluntary binding arbitration or non-voluntary mediation. Those procedures are rarely used, and the fees are not set forth in a rule. If the parties pursue ADR, the Tax Court would presumably address fees and who pays them in the order addressing the arbitration or mediation process. Mediation is common in the federal district courts. Local court rules often address payments for neutrals, which differ among courts. The Court of Federal Claims has flexible procedures that allow for various types of ADR, some of which are at no cost to the parties.

11. STATISTICS

11.1 Pending Tax Court Cases

The United States Tax Court does not publish case statistics on its pending cases. Generally, as the only available prepayment forum, the Tax Court hears the vast majority of tax cases, with approximately 25,000 to 30,000 new cases filed each year. In comparison, the United States district courts and the Court of Federal Claims hear far fewer tax cases. In 2020, taxpayers filed 268 new tax cases in the United States district courts and 74 new tax cases in the United States Court of Federal Claims.

11.2 Cases Relating to Different Taxes

There is no reliable data regarding the number of cases initiated and terminated each year relating to different taxes.

11.3 Parties Succeeding in Litigation

There is no reliable data available regarding the party (tax authority or taxpayer) that succeeds in litigation.

12. STRATEGIES

12.1 Strategic Guidelines in Tax Controversies

Taxpayers should fully develop their tax positions before filing their returns and be prepared for IRS review before the audit begins. This includes investigating the relevant facts, analysing applicable legal authorities, memorialising such analysis, and preserving material information. Ideally tax personnel will be integrated into the overall operation, leverage available technological and digital tools, and monitor relevant judicial, legislative, regulatory and tax administration developments.

During the audit, taxpayers should be proactive, take care in responding to information requests, preserve applicable privileges, communicate their tax positions clearly and in the strongest possible light, and involve outside advisors and experts early enough in the process to minimise the risk of a protracted dispute. Taxpayers should attempt to resolve the issue during the audit, if possible.

If a satisfactory resolution is not possible at the examination level, taxpayers should carefully consider the available administrative and judicial dispute-resolution procedures and pursue those most appropriate for their issues to maximise their ability to obtain a favourable result.

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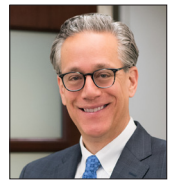

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