

By Sherrill L. Gregory, EA, USTCP

The Tax Court Exam



As IRS audits more taxpayers, it is probable that more notices of deficiency will result. For deficiency cases, a timely filed petition in response to the statutory notice grants jurisdiction to the Tax Court (the Court). The main advantage to litigating tax controversies in this Court is that the tax, interest, and penalties do not need to be paid before the petition is filed, making it a more taxpayer-friendly venue than other courts.

What options are available to an EA or CPA when a client receives that 90-day letter? Can an EA or CPA prepare a petition for the taxpayer? Can either professional represent a taxpayer at an IRS administrative hearing once a case is docketed? Is it possible to meet with IRS area counsel in pretrial proceedings on a docketed case? What must an EA or CPA do to practice in Tax Court?

Admission to the Tax Court

In Court proceedings, taxpayers can represent themselves (*pro se*) or be represented by an individual¹ admitted to practice before the Court, whether he or she is an attorney² or not.

While EAs and CPAs are granted authority under Circular 230 to represent taxpayers at all IRS administrative hearings, that authority does not extend to the Tax Court. There is disagreement among some professionals as to whether an EA or CPA can prepare a client's Tax Court petition, but it is clear an individual who is not admitted to practice *cannot* sign a client's petition.³

When the Board of Tax Appeals (precursor to the U.S. Tax Court) was established in 1924, non-attorneys were admitted to practice on equal footing with attorneys. This changed in 1942 when automatic admission to practice was restricted to attorneys. The Tax Court exam process arose because, under § 7452, "no qualified person shall be denied admission to practice before the Tax Court because of his failure to be a member of any profession or calling."

Under current Tax Court rules (adopted September 20, 2005),⁴ before being admitted, an applicant must establish to the Court's satisfaction he or she is "of good moral and professional character and possesses the requisite qualifications to provide competent representation before the Court."

About the Author:

After passing the Tax Court exam on her first attempt, Sherrill L. Gregory, EA developed Preparing to Practice before the U.S. Tax Court, a course designed to assist other tax professionals studying for this exam. Her tax preparation and representation practice is located in Southern California. Email questions to Sherrill at mbamstea@earthlink.net.

Interested applicants must submit a completed Application for Admission to Practice for non-attorneys and the appropriate fee. Before admission, the applicant must pass the exam and be sponsored by two persons who are admitted to practice before the Court. Once admitted, a non-attorney has the same rights and responsibilities as an attorney, but only in Tax Court.

The Written Admission Examination

By law the exam must be held no less often than every two years. It is likely the next anticipated exam will occur November 13, 2008⁵ at the Tax Court building in Washington, DC. The Court must publish a press release announcing the exam date and provide pertinent information, including the fee (\$75 in 2006) and dates that applications are accepted. Watch ustaxcourt.gov during April 2008 for this.

Over a four-hour period, the 2006 Tax Court exam tested competence in these subject areas:

- **Tax Court Rules of Practice and Procedure** tests information contained in the Tax Court's *Rules of Practice & Procedure*, including areas of court jurisdiction. (25 percent or 60 minutes of allocated time)

- **Federal Taxation** tests information contained in the Internal Revenue Code and its regulations, along with recent Tax Court and other tax-related court decisions. (40 percent or 96 minutes)

- **Evidence** tests information contained in the *Federal Rules of Evidence*, including evidentiary applications in the courtroom. (25 percent or 60 minutes)

- **Legal Ethics** tests information contained in the American Bar Association's *Model Rules of Professional Conduct*, including practitioner conflicts of interest and imputed disqualification. (10 percent or 24 minutes)

The entire exam must be passed at one sitting with a score of 70 percent or better on each section. Exam answers are recorded in blue books provided by the Court. Grammar and spelling are not graded, but answers should be concise and legible.

Practice and Procedure may be the easiest section for an applicant to pass. A copy of the *Rules of Practice and Procedure*⁶ is available during the exam. Topics include Court rules and procedures, along with IRS requirements in the process. Knowledge of jurisdiction is tested with questions that ask if the Tax Court has subject matter jurisdiction in different situations; most often these questions require only "yes" or "no" answers. Many questions can be answered with a list (which lends itself to mnemonics or other memorization tools) or a short essay.

From past exam questions it is evident the Court uses its own cases on the exam. Applicants should be familiar with recent Tax Court cases, along with Court of Appeals decisions (especially those that overturn or affirm Tax Court decisions) and Supreme Court decisions relating to tax matters.

Federal Taxation is a surprisingly difficult exam section, even for those who have already demonstrated competency in tax knowledge. While a copy of the IRC is available during the exam, time passes too quickly to look up many answers. Broad areas of tax law can be tested rapidly in a series of questions to "state the gross income" in various situations. Certain exam topics recur with regularity, including cancellation of indebtedness income, travel expense deductibility, estate and gift issues, marriage and divorce, partnership and corporation formation and liquidations, S corporate distributions, and real estate transactions. A calculator can be used for any required calculations.

Questions that look much too difficult to be true are likely from a Court case; although the party's name does not appear in the question, the fact pattern will be unique.

Evidence, added as a separate exam section in 1996, may be the most difficult section for non-attorneys to pass. The questions generally pose courtroom scenarios which require the applicant to recognize hearsay or other evidentiary issues presented in testimony and apply the relevant rules. No reference material is permitted for this section.

Legal Ethics was also added in 1996. As the smallest section, the temptation may be to shortchange study efforts, but it must be passed with the same competency level as all

the other sections. A copy of the ABA *Model Rules of Professional Conduct* is provided for use during the exam.

The 2006 exam results were available in late March 2007. Of the fifty-eight applicants who sat for the exam, six passed (all six were from the author's 2006 prep course). A successful applicant knows only that a passing score was achieved. An unsuccessful applicant can purchase a copy of his or her responses for a nominal fee (\$8 for the 2006 exam) but must make the request soon after notification. Unless appeals are pending, all exam answers are destroyed 120 days after notification of the exam results.

Previously, only three lifetime attempts at this exam were permitted, but now applicants may retake the Tax Court exam as often as desired.

Why Take the Tax Court Exam?

The odds of passing the exam are against the applicant. For several recent exam cycles the pass rate ranged between 5.6 percent and 16.5 percent.⁷ So, why make the considerable effort to join the approximately 241⁸ people who have passed this exam since the 1942 change?

Court jurisdiction today is much broader than the deficiency issues it was designed to handle, so there is more opportunity for a professional to practice. The Court has jurisdiction only as granted by Congress and can hear cases related to deficiencies, innocent spouse relief requests, some employment tax issues, collection cases, and more. In a recent change, all Collection Due Process (CDP) cases are now heard in Court for petitions filed after March 13, 2007.

According to Nina Olson's Taxpayer Advocate 2006 Annual Report to Congress,⁹ having representation can enhance a taxpayer's success in Tax Court. While a non-attorney may never be comfortable handling a complex Tax Court trial (there are benefits to three years of law school) there are ways to help clients, especially in the S case forum¹⁰ where proceedings are more informal and the rules of evidence are relaxed.

For some Circular 230 professionals the Tax Court exam represents the epitome of excellence, a challenge to be conquered simply

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because it is there. Adding those coveted letters after your name demonstrates a high level of professional competence.

There may be extrinsic values as well. If an Appeals Officer knows the practitioner is able to take a case to Tax Court, will that affect the hazards of litigation assessment in the IRS' decision to settle a case? Although that cannot be tested empirically, it appears to be true based upon conversations the author had with area or district counsel over the past few years. Several IRS attorneys indicated that resolution is more likely in Appeals if the practitioner has the ability to represent the taxpayer in Court, especially if the litigated dollar amounts are not large.

Understanding Tax Court procedures and processes allows the savvy professional to provide the highest level of service to his or her

clients. A non-attorney practitioner is competent to advise clients on court procedures and to help assess a potential case and the decision to file a petition. The practitioner's knowledge can influence a client's success in Court even if the case is settled before trial.

How to Study for the Exam

Questions for the past three exams can be purchased from the Court. Sadly, no official or suggested answers are published, which makes knowing how to study for this rigorous exam more challenging. Some exam questions repeat, but use current tax law to answer a prior exam question rather than relying on what was the appropriate response then.

Because it appears the Court uses its own cases for exam questions, the wise applicant

should visit ustaxcourt.gov on a daily or weekly basis to read the regular and memorandum opinions published. It helps to experience the language and process of the Court and can guide your studies by identifying case trends that may become exam topics. Remember the Tax Court exam is written and administered by judges of the Tax Court.

Find study aids (such as flash cards, audio tapes, and printed study guides which may have practice questions and answers) from law school bookstores to assist with federal taxation, evidence, and legal ethics studies. Watch copyright dates to avoid studying dated material that may have changed.

Even better, make your own flashcards, audio tapes, or outlines as study aids. Whatever your learning style, using as many of

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your senses as possible during study helps with long-term memory retention and recall. Reading, writing, hearing, and speaking the material as many ways as possible is an effective way to study.

Applicants should practice writing answers, not just to strengthen their hand (when was the last time anyone wrote four hours straight?), but also to establish what is known, and more importantly, what is not known. Writing and saying it aloud will help identify areas where knowledge is not yet complete.

Stay current on tax law changes by attending education seminars and reading professional journals.

Time management and test taking skills are very important to cultivate. Taking one or two timed practice tests can replicate the pressure

of actual exam-day conditions. If all sections are not addressed within the four hours, the applicant will fail even if the other sections are 100 percent correct.

Finally, there are a few courses available privately to assist in exam preparation, including a series of classes presented by the author to prepare professionals for this exam.

Want More Information?

There will be a Tax Court class offered at this year's NTPI. The class will provide an introduction to Court procedures and include a discussion on exam preparation. The class is available to all Circular 230 professionals—see www.naea.org for registration information.

It is not too early to start preparing for the 2008 Tax Court exam. **EA**

Endnotes

¹ Only individuals can be admitted to practice; corporations and firms are not admitted or recognized.

² An attorney is admitted after completing an application, paying a fee, and establishing that he or she is a member in good standing in the appropriate court. The attorney is not required to demonstrate any competence in federal taxation law.

³ A representative who signs the petition must provide a Tax Court Bar Number under Rule 34.

⁴ Rule 200(a)(1)

⁵ Generally, the exam is given the second Thursday of November, unless Veteran's Day conflicts with this date.

⁶ The Rules can be downloaded from ustaxcourt.gov or obtained from the Court for \$22.

⁷ In 2000, 17 out of 103 passed (16.5%); in 2002, 7 out of 47 passed (14.9%); in 2004, 4 out of 72 passed (5.6%). Compare this with 10.5% in 1992 (8 out of 76); 10.2% in 1994 (13 out of 127); 8% in 1996 (14 out of 175); and 8.3% in 1998 (13 out of 156)

⁸ According to a 3/9/07 telephone call with Christina Ayres, admissions clerk for the Tax Court, 7,342 people have been admitted as non-attorney practitioners through the 2004 exam. Some 7,101 of those were grandfathered into practice before the Court in 1942.

⁹ See the Ten Most Litigated Tax Issues segment at irs.gov/pub/irs-utl/2006_arc_section3.pdf.

¹⁰ In small tax cases the tax owed per year generally does not exceed \$50,000.

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