

# Procedural Issues of Human Rights and Taxation: Access to Justice

By The Honorable Peter J. Panuthos<sup>1</sup>

## I. Procedural Guarantees in Administrative and Judicial Proceedings

### a. Internal Revenue Service Taxpayer Bill of Rights

On the administrative level the Internal Revenue Service (IRS), which administers and enforces the tax laws of the United States (U.S.)<sup>2</sup>, adopted a Taxpayer Bill of Rights (TBOR) in 2014. The TBOR includes:

- ! The Right to Quality Service
- ! The Right to Pay No More than the Correct Amount of Tax
- ! The Right to Challenge the IRS' Position and be Heard
- ! The Right to Appeal an IRS Decision to an Independent Forum
- ! The Right to be Informed
- ! The Right to Finality
- ! The Right to Privacy
- ! The Right to Confidentiality
- ! The Right to Retain Representation
- ! The Right to a Fair and Just Tax System<sup>3</sup>

The United States government through various government institutions, including the IRS and the U.S. Tax Court (Tax Court), and public and private organizations such as law schools and legal services organizations, strive to ensure that the rights of all taxpayers are protected in administrative and judicial proceedings. We discuss some of these measures in the context of the IRS appeals process, the Tax Court litigation process, judicial independence, and provision of counsel to self-represented petitioners.

### b. The Tax Collection System: Assessments and Examinations

In the United States, the collection of taxes begins with an assessment; without an assessment, no recorded tax liability exists.<sup>4</sup> If a taxpayer does not file a return, the IRS goes through the process of examination to assess a taxpayer's liabilities.<sup>5</sup> The IRS is authorized by statute to prepare a substitute return by "gathering information and making computations through electronic, automated or other means to make a determination of the taxpayer's tax liability." The IRS then assesses a tax liability based on this substitute return.<sup>6</sup> If a taxpayer has filed a tax return, the IRS has authority to assess the tax. The IRS selects returns for examination to determine if the amount reported on the return is the correct amount of tax.<sup>7</sup>

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<sup>1</sup>Judge Panuthos acknowledges the valuable assistance provided by Camille Edwards Bennehoff.

<sup>2</sup>The Internal Revenue Service, a branch of the U.S. Department of Treasury, an executive department, is authorized to administer and enforce the Internal Revenue Code by section 7801(a). IRS Organization Chart, [https://www.irs.gov/PUP/irs/IRS\\_Organization\\_Chart\\_May\\_2016.pdf](https://www.irs.gov/PUP/irs/IRS_Organization_Chart_May_2016.pdf) (May 2016).

<sup>3</sup>26 U.S.C. § 7803(a)(3) (2015).

<sup>4</sup>The process of assessment is akin to the IRS recording in its records a tax due from the taxpayer.

<sup>5</sup>Keith Fogg & Simone Jozipovic, *How Can Tax Collection Be Structured to Observe and Preserve Taxpayer Rights: A Discussion of Practices and Possibilities*, 69 Tax Law 513, 516 (2011).

<sup>6</sup>26 U.S.C. § 6020(a) (1984); Treasury Reg. § 301.6020-1(b)(1) (2008).

<sup>7</sup>Fogg & Jozipovic *supra* note 5 at 516.

The examination process, also called the “audit,” where the IRS examines the taxpayer’s information to determine the proper tax that should have been reported, can be performed via mail, called a “correspondence audit”, or with an in-person interview called a “field audit.” For the year ending September 30, 2015, 72.6% of total audits were correspondence audits, and the remaining 27.4% were field audits. Field audits, in which a taxpayer will have an IRS representative as a point of contact, are usually reserved for cases where the individual’s or business’ gross income exceeds \$100,000 for the year.<sup>8</sup> At the end of the audit the taxpayer receives a Notice of Proposed Adjustment explaining the additional amount due.<sup>9</sup>

c. Right to Challenge The IRS’ Position and Be Heard: IRS Administrative Appeals

The majority of Federal tax controversies are settled at the administrative level with the IRS, before formal litigation is commenced.<sup>10</sup>

If the taxpayer disagrees with the amount in the Notice of Proposed Adjustment, or fails to respond to the notice, the IRS will first issue a “30-day” letter formally stating the examiner’s determination and informing the taxpayer of his appeal rights. A taxpayer can respond to the 30-day letter with a written protest.<sup>11</sup> If the amount for any tax year is less than a designated amount the taxpayer can make an informal protest before the IRS Office of Appeals.<sup>12</sup>

The IRS Office of Appeals is the “alternative dispute resolution forum of the IRS and offers the final opportunity for the taxpayer and the IRS to address unresolved issues” before resorting to formal litigation. The IRS Office of Appeals location where a taxpayer protests the audit determination is “separate from and independent of the IRS office” that conducted the audit.<sup>13</sup> The IRS Appeals officer has authority to negotiate and settle the issue on behalf of the IRS. IRS Office of Appeals conferences are generally informal and often conducted by telephone or correspondence, but a taxpayer can request an in-person meeting.<sup>14</sup> Taxpayers working with the IRS Office of Appeals can be self-represented or be represented by a “federal authorized practitioner” such as a tax attorney or certified public accountant (C.P.A.).<sup>15</sup> The IRS Appeals officer will work with the taxpayer and the IRS to reach a settlement.<sup>16</sup>

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<sup>8</sup>*Enforcement: Examinations and Table 9a Examination Coverage: Recommended and Average Recommended Additional Tax After Examination, by Type and Size of Return, Fiscal Year 2015*, IRS, <https://www.irs.gov/uac/enforcement-examinations> (last reviewed or updated March 30, 2016).

<sup>9</sup>Brendan J. Sponheimer, *The Examination and Administrative Appeals Process*, 27 *Prac. Tax Law* 23, 29 (2013).

<sup>10</sup>*Id.* at 23.

<sup>11</sup>Treas. Reg. § 601.105(d)(1)(iv) (as amended Oct. 16, 1987).

<sup>12</sup>See Treas. Reg. § 601.105(d)(2)(iv) (as amended Oct. 16, 1987). If the amount exceeds this threshold the taxpayer must make a more formal protest.

<sup>13</sup>I.R.S. Pub. 556, 6 (revised September 2013).

<sup>14</sup>Sponheimer *supra* note 9 at 30-31 (citing the Internal Revenue Manual).

<sup>15</sup>I.R.S. Pub. 556, 9 (revised Sept. 2013).

<sup>16</sup>Sponheimer *supra* note 9 at 30-31 (citing the Internal Revenue Manual).

The IRS Office of Appeals issued a memorandum on July 13, 2013, implementing phase 1 of a new policy called the Appeals Judicial Approach and Culture (AJAC) Project.<sup>17</sup> The purpose of the AJAC Project is to “promote a quasi-judicial approach in how the Appeals office handles its cases.” The AJAC Project updated some of the procedures and processes of the IRS Office of Appeals, with the most significant change relating to the general policy statement. The general policy statement provides the following: (1) IRS Appeals officers cannot raise new issues and (2) IRS Appeals officers cannot not reopen an issue on which the taxpayer and IRS are in agreement. This represents a significant change in the Appeals process. In the past an IRS Appeals officer “could raise a new issue if the grounds were substantial and the potential impact on the tax liability material” or could reconsider issues agreed to at the examination level.<sup>18</sup>

The IRS Office of Appeals also provides arbitration and mediation options, potentially available when the taxpayer and the IRS cannot come to a settlement before an IRS Appeals officer. These options are available in limited circumstances, set forth in the applicable Revenue Procedure. Neither option is available for cases docketed in court. The procedures for arbitration or mediation with the IRS Office of Appeals are fairly similar; before the procedure begins all parties enter into a preliminary written agreement that sets forth the scope of the arbitration or mediation. The parties can choose a mediator or arbitrator that is trained by the IRS or a non-IRS person from an organization that provides a roster of neutral and qualified persons.<sup>19</sup> Mediation and arbitration at the IRS Office of Appeals often follow the generally accepted procedures for alternative dispute resolution; for example, the decision of the arbitrator cannot be appealed by either party or contested in a judicial procedure.<sup>20</sup>

If the parties cannot come to a mutually acceptable settlement in the IRS Office of Appeals, the IRS Appeals officer will issue a statutory notice of deficiency.<sup>21</sup> The IRS also issues a statutory notice of deficiency when taxpayers do not respond within the 30 days set forth in the Notice of Proposed Adjustment.<sup>22</sup> The statutory notice of deficiency informs the taxpayer that he can challenge the deficiency determination, and includes instructions on the due date for filing a petition before the Tax Court.<sup>23</sup> The statutory deficiency includes a notice to the taxpayer of the taxpayer’s right to contact a local office of the taxpayer advocate and the location and telephone number of the local taxpayer advocate.<sup>24</sup>

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<sup>17</sup>Kathy Petronchack, *Implementation Guidance for Appeals Judicial Approach and Culture Project*, The Tax Adviser <http://www.thetaxadviser.com/issues/2014/jan/tpp-jan2014-story-03.html> (Jan. 1, 2014). This was further clarified by a memorandum issued on July 2, 2014, that implemented phase 2. *Implementation of the Appeals Judicial Approach and Culture (AJAC) Project Phase 2*, I.R.S. [https://www.irs.gov/pub/foia/ig/spder/AP-08-0714-0004%20REDACTED\[1\].pdf](https://www.irs.gov/pub/foia/ig/spder/AP-08-0714-0004%20REDACTED[1].pdf) (July 2, 2014).

<sup>18</sup>Petronchack *supra* note 17.

<sup>19</sup>See Rev. Proc. 2009-44 2009-40 I.R.B. 462; Rev. Proc. 2006-44, 2006-44 I.R.B. 800.

<sup>20</sup>Sponheimer *supra* note 9 at 30-31 (citing the Internal Revenue Manual).

<sup>21</sup>Sponheimer *supra* note 9 at 33-34 (citing the Internal Revenue Manual).

<sup>22</sup>Treas. Reg. § 601.105(d)(1)(iv) (as amended Oct. 16, 1987).

<sup>23</sup>*Understanding Your LT3219B Notice*, <https://www.irs.gov/individuals/understanding-your-lt3219b-notice> (last reviewed or updated April 30, 2016).

<sup>24</sup>Sec. 6212(a). See below a further discussion of the taxpayer advocate.

#### d. Right to Appeal to an Independent Forum: Trial Courts May Consider Tax Disputes

Taxpayers have the right to appeal a statutory notice of deficiency to an independent forum. Taxpayers in many tax cases, including income tax disputes<sup>25</sup> can appeal decisions from the administrative level (IRS Office of Appeals) to three trial-level courts: Federal District courts (District courts), the Court of Federal Claims, and the Tax Court.<sup>26</sup> These three courts are government bodies separate and distinct from the IRS. In both the Court of Federal Claims and the District courts, the taxpayer has to first pay the disputed tax liability and then sue for a refund; these are called “refund jurisdictions.” The Tax Court is the only court in which a taxpayer can dispute the IRS’ determination without first paying the amount in dispute; this is called a “prepayment jurisdiction.”<sup>27</sup> Attorneys from the U.S. Department of Justice represent the federal government in tax matters in District courts and the Court of Claims, while attorneys from the IRS represent the federal government in cases before the Tax Court.<sup>28</sup>

District Courts are located throughout the nation. There are 94 judicial districts, with at least one district in each state and the District of Columbia.<sup>29</sup> District courts have jurisdiction over cases under the laws of the United States, which includes most tax cases. District courts are called ‘Article III’ courts because their judicial power is derived from Article III of the United States Constitution, along with acts of Congress.<sup>30</sup> Article III judges are appointed for life.<sup>31</sup>

Both the Court of Federal Claims and the Tax Court have nationwide jurisdiction, hear cases in cities across the country, and are based in Washington, D.C. Both courts are called ‘Article I’ courts because their judicial power is derived solely from Congress, which is set forth in Article I of the United States Constitution.<sup>32</sup> Article I judges are appointed for 15-year terms. The Court of Federal Claims hears cases in which the plaintiff has a monetary dispute with the United States, and thus can hear cases in which the taxpayer is disputing his tax liability with the IRS.<sup>33</sup>

Although taxpayers may have a choice of forum when appealing an IRS appeals decision, most tax disputes come to the Tax Court, for the reasons discussed below.

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<sup>25</sup>Income tax, estate tax, gift tax, and partnership tax cases can usually be appealed to one of the three courts. There are limitations on the jurisdiction of each of the courts. Sec. 6404(h); Hanks v. United States, 550 U.S. 501 (2007); Sec. 6330(d)(1). A more detailed exploration of jurisdiction in various tax cases is outside the scope of this paper.

<sup>26</sup>Sec. 601.106(a)(1)(i) and (d)(2)(iii). Treas. Regs. The bankruptcy court has some limited jurisdiction to hear tax cases, but that it outside the scope of this paper. Gerald A. Kafka, *Choice of Forum in Federal Civil Tax Litigation (Part I)*, 25 Prac. Tax. Law 55 (2011).

<sup>27</sup>Thomas D. Greenaway, *Choice of Forum in Federal Civil Tax Litigation*, 62 Tax Law 311, 312 (2009).

<sup>28</sup>James Edwards Maule, *Instant Replay, Weak Teams, and Disputed Calls: An Empirical Study of Alleged Tax Court Judge Bias*, 66 Tenn Law Rev. 351, 365 (1999).

<sup>29</sup>*Court Website Links*, U.S. Courts, <http://www.uscourts.gov/about-federal-courts/federal-courts-public/court-website-links> (last visited Aug. 8, 2016).

<sup>30</sup>Greenaway *supra* note 27 at 311.

<sup>31</sup>Nicholas R. Metcalf & Mary W. Prosser, *Litigating a Case Before the U.S. Tax Court*, 61 Fed Law 33, 33 (2014).

<sup>32</sup>Freytag v. Commissioner, 501 U.S. 868, 888 (1991) (noting that the Tax Court is an Article I court); Williams v. United States, 289 U.S. 533, 581 (1933) (noting that the Court of Claims is an Article I Court).

<sup>33</sup>Greenaway *supra* note 27 at 311.

e. Right to Appeal to an Independent Forum: United States Tax Court

The Tax Court conducts trial sessions in 74 cities nationwide.<sup>34</sup> As previously discussed petitioners in Tax Court have to pay the deficiency only if their case is unsuccessful, unlike the other courts where taxpayers have to pay the deficiency and then sue for a refund. This is often an important consideration when choosing a forum to dispute taxes, especially for low-income taxpayers.<sup>35</sup> Tax Court has jurisdiction to hear only tax cases, unlike the District courts and the Court of Federal Claims, which both have jurisdiction over a wide variety of cases. Tax Court judges also specialize in federal taxation, which sets them apart from the judges in the District courts and the Court of Federal Claims, where the judges are generalists hearing cases in various areas of law.<sup>36</sup>

It has been suggested that another factor that may cause most tax cases to be filed in Tax Court is the notice of deficiency; the notice of deficiency informs the taxpayer of his or her ability to file a petition in Tax Court, but does not mention the other courts in which the taxpayer can file. This standard format does not include information about the alternative sue for refund in a District court or the Court of Federal Claims.” Once the taxpayer petitions the Tax Court, he cannot change forums.<sup>37</sup>

Most tax cases are filed in the Tax Court. As of June 30, 2016, the Tax Court had 25,758 cases pending, with the amount in dispute (taxes plus penalties assessed) totaling almost \$23.5 billion; by contrast, the total cases pending in refund tax litigation forums (the Federal District courts and the Court of Federal Claims) totaled only 901, with amount in dispute totaling \$8.8 billion.<sup>38</sup> Many of the petitioners in Tax Court cases do not have representation<sup>39</sup>; according to current statistics, more than 70% of petitioners will not have the assistance of a representative such as an attorney. In small tax cases “95% of petitioners might be self-represented” while in a regular (non-small) case, “approximately 50% of petitioners are self-represented.”<sup>40</sup>

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<sup>34</sup>*Places of Trial*, U.S. Tax Court, [http://www.ustaxcourt.gov/dpt\\_cities.htm](http://www.ustaxcourt.gov/dpt_cities.htm) (last visited Aug. 9, 2016).

<sup>35</sup>Greenaway *supra* note 27 at 317.

<sup>36</sup>Metcalf & Prosser *supra* note 31 at 34.

<sup>37</sup>Leandra Lederman, *(Un)Appealing Deference to the Tax Court*, 63 Duke Law 1835, 1837 n. 3 (2014).

<sup>38</sup>*SOI Tax Stats-Chief Counsel Workload: Tax Litigation Cases by Type of Case – IRS Data Book Table 27*, IRS, <https://www.irs.gov/uac/soi-tax-stats-chief-counsel-workload-tax-litigation-cases-by-type-of-case-irs-data-book-table-27> (Last reviewed or updated March 20, 2016).

<sup>39</sup>Attorneys and qualified non-attorney applicants can represent clients before Tax Court. Tax Court Rule 200. Non-attorney applicants must pass an exam that tests the applicant’s knowledge of Tax Court Rules of Practice and Procedure, Federal Taxation, the Federal Rules of Evidence, and legal ethics.

<sup>40</sup>Small tax cases or “S” cases are authorized by section 7463. In these cases, the amount in dispute for a tax year does not exceed \$50,000. Under Rules 170 through 174, a petitioner may elect to try his or her case under small tax case procedures, which has benefits to a self-represented petitioner including “somewhat relaxed rules of evidence”, simplified procedures, and additional trial venues. Decisions in small tax cases cannot be appealed by either the petitioner or the IRS. Hon. Peter J. Panuthos, *The United States Tax Court and Calendar Call Programs*, Tax Law 69 Tax Law 439, 440 (2015).

Given its high volume of cases, many of which involve taxpayers without representation, the Tax Court has taken a number of important steps to provide such taxpayers with a measure of access to justice:

- ! Publication of Rules
- ! Booklet
- ! Website
- ! Videos
- ! Recognition by Judicial Officers to explain procedures

The Tax Court strives to inform taxpayers about their rights. The Tax Court rules of practice and procedure are made available to the public and published on the website in .pdf format.<sup>41</sup> In 2009 the Tax Court significantly expanded its website, adding features designed to inform and assist self-represented taxpayers.<sup>42</sup> The Tax Court website has a “Taxpayer Information” section, that provides information for individuals who represent themselves before the Tax Court, including (1) how to file a petition, (2) what occurs before, during, and after trial, and (3) definitions of relevant terms.<sup>43</sup> The Tax Court website has a section with videos that explain its processes and procedures to taxpayers.<sup>44</sup> The Tax Court website also has information about the calendar call program, which provides free legal services to low-income, self-represented petitioners, as we will discuss further.<sup>45</sup> Upon request, the Tax Court will also send a book and package explaining taxpayer rights and Tax Court practice and procedure to self-represented petitioners that request assistance. Further, Tax Court judges recognize that self-represented taxpayers, many of them low-income, may not understand Tax Court practice and procedures in the same way a trained tax attorney would, so they explain the procedures to these taxpayers at the calendar call, the beginning of trial, and throughout the process as needed.

## II. The Right to Appeal to Independent Bodies

### a. Independence of the Judiciary

The Court or Tribunal to which a taxpayer seeks an appeal must be independent of the taxing authority. Anything less than full independence can result in actual or apparent bias of the decision making authority. The issue of independence is both political and structural.<sup>46</sup>

The legislature must give the Court or Tribunal authority to decide a case without interference, which includes some level of a de novo hearing as well as full independence of the

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<sup>41</sup>*Rules of Practice and Procedure*, U.S. Tax Court, <http://www.ustaxcourt.gov/rules.htm> (last updated June 14, 2016).

<sup>42</sup>Keith Fogg, *Taxation With Representation: The Creation and Development of Low-Income Taxpayer Clinics*, 67 *Tax Law* 3, 50 (2013).

<sup>43</sup>*Taxpayer Information: Introduction*, U.S. Tax Court, [http://www.ustaxcourt.gov/taxpayer\\_info\\_intro.htm](http://www.ustaxcourt.gov/taxpayer_info_intro.htm) (last updated Aug. 26, 2010)

<sup>44</sup>*An Introduction to the United States Tax Court: Welcome & Overview*, U.S. Tax Court, [http://www.ustaxcourt.gov/ustc\\_video\\_welcome.htm](http://www.ustaxcourt.gov/ustc_video_welcome.htm) (last updated Aug. 26, 2010).

<sup>45</sup>*Clinical, Student Practice & Bar Sponsored Calendar Call Program*, <http://www.ustaxcourt.gov/clinics.htm> (last updated June 26, 2015).

<sup>46</sup>Hon. William H. Pryor, *Judicial Independence and the Lesson of History*, 68 *Ala. L. Rev.* 389, 390 (2007).

judiciary. Independence of the judiciary is dependent, in part, in not permitting removal of a Judicial Officer without cause. Once appointed, the Judge should not be subject to political or legislative pressures. Judges are often called upon to decide controversial, difficult, and emotionally charged cases, and should be able to make a decision based on the rule of law instead of worrying about external forces.<sup>47</sup>

Structural integrity is also important. The judiciary which interprets and upholds the law should be separate from the legislature and the executive branch; this separation of powers constitutes a system of checks and balances meant to prevent abuses of power by any of the three branches. “This independence means that both the Judiciary as an institution and also the individual judges deciding particular cases must be able to exercise their professional responsibilities without being influenced by the Executive, the Legislature or any other inappropriate sources.”<sup>48</sup> In the context of United States tax law, this also means that the Tax Court and other courts which interpret and uphold the tax laws should be independent of the legislative and executive branches, including the IRS which collects tax revenues and enforces tax laws. The IRS, as a bureau of the U.S. Department of Treasury, is part of the executive branch, and its attorneys represent the government in cases before the Tax Court, so it is important that the Tax Court be separate and free from its influence.

#### b. Tax Court Independence

While some critics have cited statistics that taxpayers are “more often than not” unsuccessful in cases before Tax Court, empirical data shows that Tax Court judges often have “no choice but to hold in favor of the IRS. These issues include the failure of the taxpayer to appear or the failure of the taxpayer to introduce evidence, the incontrovertible requirements of the Congressionally enacted Internal Revenue Code, or similar constraining reasons.” Tax Court judges uphold and interpret the law and cannot argue the cases for the unsophisticated taxpayer. Judges are required to be impartial.<sup>49</sup> However judicial ethics permit a judge to take a more active role to assist a self-represented petitioner.<sup>50</sup> The Code of Judicial Conduct for the District of Columbia Courts states that “the judge should not give self-represented litigants an unfair advantage or create an appearance of partiality to the reasonable person; however, in the interest of ensuring fairness and access to justice, judges should make reasonable accommodations that help litigants who are not represented by counsel to understand the proceedings and applicable procedural requirements, secure legal assistance, and be heard according to law.”<sup>51</sup>

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<sup>47</sup>Jeffrey M. Sharman, *Judicial Ethics: Independence, Impartiality, and Integrity* (1996), <http://www.iadb.org/wmsfiles/products/publications/documents/991625.pdf> (last visited Aug. 9, 2016).

<sup>48</sup>*Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors, and Lawyers*, Office of the High Commissioner for Human Rights, 115 <http://www.ohchr.org/Documents/Publications/training9chapter4en.pdf> (2003)

<sup>49</sup>Maule *supra* note 28 at 356 and 425.

<sup>50</sup>Zoe Tillman, *Judges may take bigger role guiding pro se*, Nat'l L.J. <http://www.nationallawjournal.com> (Oct. 3, 2011).

<sup>51</sup>*Code of Judicial Conduct*, D.C. Courts, Rule 2.6 Comment 1A, <http://www.dccourts.gov/internet/documents/2012-Code-of-Judicial-Conduct.pdf> (2012).

This leads us to a discussion of the importance of providing counsel to petitioners in Tax Court who otherwise would have represented themselves.

### III. Provision of Counsel to Self-Represented Petitioners

Given the complexity of the tax system it is axiomatic that despite all the information the tribunal attempts to provide to a self-represented taxpayer, proceeding without counsel may operate as a disadvantage to the taxpayer.

Represented taxpayers generally obtain a better result when dealing with the IRS or before the Tax Court than those who are not represented; studies show that in administrative proceedings and cases before the Tax Court, represented taxpayers are “nearly twice as likely to receive a positive outcome” when compared to an unrepresented taxpayer.<sup>52</sup> According to a study by the Taxpayer Advocate Service, even if an unrepresented taxpayer achieves a positive outcome, a taxpayer with representation still receives a greater reduction of the disputed taxes than one without representation.<sup>53</sup>

#### a. IRS Taxpayer Advocate Service

The Taxpayer Advocate Service (TAS) is an independent organization inside the IRS that helps taxpayers resolve problems that are not resolved through administrative appeals and other normal channels.<sup>54</sup> Each individual or business taxpayer that seeks help from the TAS is assigned an advocate who understands the law and IRS practice and procedure, and will help the taxpayer understand what needs to be done to resolve his tax issue. For example, the TAS has helped taxpayers abate penalties imposed by the IRS, prove eligibility for the earned income tax credit (EITC), and correct IRS records that improperly showed the taxpayer as deceased.<sup>55</sup>

The TAS also works towards systematic change to mitigate large-scale, systematic problems experienced by groups of taxpayers.<sup>56</sup> The National Taxpayer Advocate (NTA) is the leader of the TAS and serves as the “voice of the taxpayer” within the IRS and before Congress.<sup>57</sup> The NTA issues two reports to Congress every year: an objectives report and an annual report. The objectives report describes goals and activities of the TAS planned for the upcoming year. The annual report outlines the most serious problems currently facing taxpayers, the most frequently litigated issues of the year, and provides legislative and administrative recommendations for solving these problems.<sup>58</sup>

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<sup>52</sup>I.R.S. Pub. 5066, 8 (revised Dec. 2015).

<sup>53</sup>*Id.*

<sup>54</sup>*Our Leadership*, TAS, <http://taxpayeradvocate.irs.gov/about/our-leadership> (last viewed August 10, 2016).

<sup>55</sup>*How We've Helped*, TAS, <http://taxpayeradvocate.irs.gov/about/how-weve-helped> (last viewed August 10, 2016).

<sup>56</sup>Amanda Bartmann, *Making Taxpayer Rights Real: Overcoming Challenges to Integrate Taxpayer Rights into a Tax Agency's Operations*, 69 *Tax Law* 597 (2016).

<sup>57</sup>*Our Leadership* *supra* note 54.

<sup>58</sup>*Reports*, TAS, <http://taxpayeradvocate.irs.gov/reports> (last viewed August 10, 2016).

Additionally, the NTA is often called to testify before Congress on a variety of subjects related to taxpayer issues. On the basis of the NTA's annual report and the NTA's testimony before Congress, many changes have been made to improve the treatment of taxpayers; the IRS has implemented hundreds of the NTA's recommendations for changes to its administrative process and Congress has enacted into law 15 bills based on the NTA's recommendations for legislative change. The NTA also advocated for the TBOR long before it was enacted.<sup>59</sup>

b. Low-Income Taxpayer Clinics (LITCs)

In 1998, United States Congress authorized the Secretary of Treasury to award matching grants up to \$100,000 per year to qualifying organizations that represent low-income taxpayers involved in controversies with the taxing authority.<sup>60</sup> Low income status is determined by reference to the U.S. Department of Health and Human Services (HHS) Poverty guidelines.<sup>61</sup>

There are three types of low-income taxpayer clinics (LITCs): (1) legal services organizations, nonprofit organizations that provide legal services to qualifying taxpayers; (2) academic clinics at law schools in which law students provide assistance while being trained and supervised by attorneys; and (3) bar associations and free-standing non-profit organizations.<sup>62</sup> These LITCs impact low-income taxpayers and the tax system in a variety of ways. First, LITCs often help clients when they feel overwhelmed by the process, and have little or no trust in the IRS, even if the IRS has taken the correct position in the case. By helping taxpayers during this time and providing an explanation of the system and law, the LITCs can help the taxpayers feel that they were treated fairly during the process. The presence of LITCs helps by making cases easier to resolve, the resolution of the case more amicable, and promotes the perception of fairness in the tax system.<sup>63</sup> Second, LITCs provide advice that can help low-income taxpayers by preventing them from encountering future issues with the IRS; for example, the LITC can explain to the taxpayers what types of income they should be reporting, which deductions and credits they are eligible for, and what kind of documentation they should keep to prove eligibility for deductions and credits. They provide tax advice and planning that low-income taxpayers normally would not have access to, which helps prevent future conflicts with the IRS. Third, LITCs advocate for their clients overall by advocating for changes to laws, regulations, and procedures that protect taxpayer rights and strive for more equitable treatment of low-income taxpayers. LITCs make system suggestions to the NTA, comment on proposed legislation or regulations, and write articles advocating for changes that will protect taxpayer rights and assist low-income taxpayers. LITCs have "a voice in the system for issues impacting low-income taxpayers."<sup>64</sup>

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<sup>59</sup>*Our Leadership supra* note 54.

<sup>60</sup>26 U.S.C. § 7526 (1998).

<sup>61</sup>I.R.S. Pub. 3319 (revised 2016).

<sup>62</sup>Fogg *supra* note 42 at 37-43.

<sup>63</sup>*Id.* at 59-60.

<sup>64</sup>*Id.* at 60.

Perhaps most importantly, LITCs also provide low-income taxpayers with professional legal advocacy. Without representation, it is difficult for our adversarial system to function as intended. While the IRS and Tax Court judges seek to enforce the tax laws in a fair and legally correct manner, our adversarial system of justice is sometimes compromised when a taxpayer is self-represented. Low-income taxpayers without representation often do not fully exercise their rights due to limitations on financial resources, time, and education; they sometimes do not understand their rights or how to navigate the difficult process.<sup>65</sup>

Many low-income taxpayers have limited education, limited or no proficiency in English, may not have internet access, and require the assistance of a more knowledgeable individual to understand what is going on and to help them navigate the complex process. Low-income taxpayers sometimes do not understand the notices they receive from the IRS, cannot access the documents the government is requesting, or do not have such documentation because they pay in cash or do not have a bank account. These taxpayers are sometimes denied access to benefits to which they are entitled because they did not know how to exercise their rights.<sup>66</sup>

c. Additional Representation for Low-Income Taxpayers in Tax Court: Calendar Call Program

The Tax Court has organized the calendar call program by which non-profit organizations, including academic institutions, can provide assistance to taxpayers who file petitions with the Court. Some bar associations, professional organizations, and LITCS administer qualifying programs through which tax attorneys can volunteer to provide free legal assistance to self-represented petitioners at the “calendar call”. These attorneys do not work for the IRS or Tax Court, but are volunteering their time for taxpayers in need.<sup>67</sup>

The calendar call is held the first day at the beginning of the trial session, and the trial clerk of the Tax Court calls through the list of the cases on the trial calendar. Each time a case is called, the petitioner’s representative or the self-represented petitioner appears by stating his or her name. Volunteering tax attorneys are available to consult with the self-represented petitioners. The Court informs the self-represented petitioners about their ability to seek this free legal assistance if they qualify at the beginning of the calendar call and also on the Tax Court website. “These conversations often lead to settlement or narrowing of the issues for trial.”<sup>68</sup>

The calendar call program began some years ago and experienced a great deal of growth in 2007 and 2008; in 2007 three cities had a calendar call program,<sup>69</sup> and by the end of 2014 there were 21 cities with independent calendar call programs. Additionally, by 2016 many of the 120+ participating tax clinics also were sending attorneys to offer legal services at the calendar call. The Tax Court is committed to access to justice for all petitioners, and has appointed an administrator of the clinic and calendar call programs, who revamped the Tax Court website in 2007 and 2008 to

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<sup>65</sup>*Id.* at 59-60.

<sup>66</sup>*Statement of Janet Spragens before the IRS Oversight Board*, [https://www.treasury.gov/IRSOB/meetings/Documents/2005statement\\_spragens.pdf](https://www.treasury.gov/IRSOB/meetings/Documents/2005statement_spragens.pdf) (Feb. 1, 2005)

<sup>67</sup>Panuthos *supra* note 40 at 440-443.

<sup>68</sup>*Id.*

<sup>69</sup>Fogg *supra* note 42 at 49

promote the calendar call program and who communicates with the programs and keeps the system functioning.<sup>70</sup>

d. Department of Justice Office for Access to Justice

The U.S. Department of Justice Tax Division handles or authorizes most civil or criminal litigation that concerns or relates to United States tax laws in federal district and appellate courts, excluding cases before the Tax Court.<sup>71</sup> In March 2010 the Department of Justice established the Office for Access to Justice (ATJ) to address the concerns about protecting the rights of the individuals in the criminal and civil justice system, including taxpayers dealing with civil and criminal tax issues in forums outside of Tax Court. The ATJ staff works with the Department of Justice, federal agencies, and other actors to “increase access to counsel and legal assistance and to improve the justice delivery systems that serve people who are unable to afford lawyers.”<sup>72</sup> The ATJ strives to eliminate barriers that prevent people from understanding and exercising their legal rights, deliver fair and just outcomes for all parties, including low-income individuals, and increase the efficiency of the justice system. The ATJ works to accomplish these goals by advocating for policies that help deliver legal aid to low-income individuals at the state and federal level, promoting alternative solutions to legal problems that requires less time in the courts and with lawyers, and expanding research on innovative strategies to lessen the need for professional legal assistance.<sup>73</sup>

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<sup>70</sup>Panuthos *supra* note 40 at 443.

<sup>71</sup>*What We Do*, U.S. Department of Justice Tax Division, <https://www.justice.gov/tax/what-we-do> (last visited Aug. 22, 2016).

<sup>72</sup>*Mission*, Office for Access to Justice, <https://www.justice.gov/atj> (last visited Aug. 10, 2016).

<sup>73</sup>*About the Office*, Office for Access to Justice, <https://www.justice.gov/atj/about-office> (last visited Aug. 10, 2016).