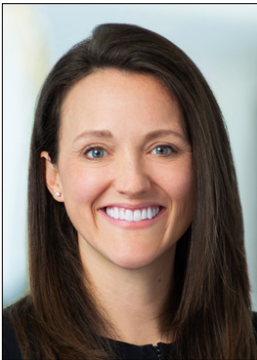




## PRACTICE POINT

# Appeal of Tax Cases: Potential Pitfalls and Procedural Issues

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This article sets forth the timetable and steps for the appeal of a tax case from both the U.S. Tax Court (Tax Court), the federal district courts, and the U.S. Court of Federal Claims (CFC).<sup>1</sup> Depending on the court from which the appeal is taken, some significant differences exist. These differences can lead to serious pitfalls, such as the failure to timely file a notice of appeal. More often, the procedural requirements for an appeal are the same, regardless of the court from which the appeal is taken, and have the same potential pitfalls. These pitfalls are highlighted in the chart below and discussed in the accompanying footnotes. The footnotes also describe in more detail the steps of an appeal.

EVENT	DEADLINE TAX COURT APPEAL <sup>2</sup>	DEADLINE DISTRICT COURT APPEAL <sup>3</sup>	POTENTIAL PITFALLS AND PROCEDURAL ISSUES
Entry of Decision (Tax Court) or Judgment (District Court)	Upon entry of order in Tax Court records specifying amount of deficiency, dismissal of case, or declaratory judgment <sup>4</sup>	Upon entry of judgment by clerk on civil docket <sup>5</sup>	Final Decisions Only <sup>6</sup> Multi-Claim Petitions <sup>7</sup>
Posting of Appeal Bond	On or before the filing of the Notice of Appeal <sup>8</sup>	Not likely required <sup>9</sup>	Failure to post bond allows IRS to assess and collect deficiency determined by Tax Court
Filing of Notice of Appeal	90 days after entry of Tax Court's decision <sup>10</sup>	60 days after entry of district court judgment <sup>11</sup>	Longer period than normal for appeal from district court because case involves the United States.  Decision to Appeal <sup>12</sup> Method of Filing <sup>13</sup> Post-Judgment Motions <sup>14</sup> Filing in Wrong Court <sup>15</sup> Cross Appeals <sup>16</sup> Joint or Consolidated Appeals <sup>17</sup> No Automatic Voluntary Dismissal <sup>18</sup>
Serving of Notice of Appeal	Service is made by the Tax Court clerk <sup>19</sup>	Service is made by the district court clerk <sup>19</sup>	Court's failure to serve notice of appeal does not affect validity of appeal <sup>20</sup>

EVENT	DEADLINE TAX COURT APPEAL <sup>2</sup>	DEADLINE DISTRICT COURT APPEAL <sup>3</sup>	POTENTIAL PITFALLS AND PROCEDURAL ISSUES
Docketing of Appeal in Circuit Court	Upon receipt of copy of notice of appeal and of docket entries from Tax Court clerk <sup>21</sup>	Upon receipt of copy of notice of appeal and of docket entries from district court clerk <sup>22</sup>	No Automatic Voluntary Dismissal <sup>23</sup>
Appellant orders Transcript and files Statement of Issues <sup>24</sup>	14 days after later of filing Notice of Appeal or entry of order disposing of certain post-judgment motions <sup>25</sup>	14 days after later of filing Notice of Appeal or entry of order disposing of certain post-judgment motions <sup>25</sup>	Transcript is already on file in most Tax Court cases and does not need to be ordered
Court Reporter files Transcript with Tax Court or District Court	30 days after receiving order for transcript <sup>26</sup>	30 days after receiving order for transcript <sup>26</sup>	The court reporter may request more time, which will lengthen the period of the appeals process,
Transmittal of Record to Circuit Court <sup>27</sup>	Upon completion of the record <sup>28</sup>	Upon completion of the record <sup>28</sup>	Assembly of voluminous lower court record may lengthen the period of the appeals process <sup>29</sup>
Filing of Brief of Appellant (30 pages; 13,000 words or 1,300 lines) <sup>30</sup> plus appendix	Within 40 days after record is filed or per the Circuit Court's briefing schedule <sup>31</sup>	Within 40 days after record is filed or per the Circuit Court's briefing schedule <sup>31</sup>	Standard of Review <sup>32</sup> Failure to File <sup>33</sup>
Filing of Brief of Appellee (30 pages; 13,000 words or 1,300 lines) <sup>34</sup>	Within 30 days after service of appellant's brief <sup>35</sup>	Within 30 days after service of appellant's brief <sup>35</sup>	Failure to File <sup>36</sup>
Filing of Appellant's Reply Brief (15 pages; 6,500 words or 650 lines) <sup>37</sup>	Within 21 days after service of appellee's brief but at least 7 days before argument <sup>38</sup>	Within 21 days after service of appellee's brief but at least 7 days before argument <sup>38</sup>	
Oral Argument <sup>39</sup>	Calendared based on circuit court's calendaring priorities	Calendared based on circuit court's calendaring priorities	Oral argument is not always granted.
Issuance of Opinion <sup>40</sup>	Following oral argument	Following oral argument	Judgment may be rendered without an opinion.
Entry of Judgment	Following receipt of opinion by clerk <sup>41</sup>	Following receipt of opinion by clerk <sup>41</sup>	Finality of Decision <sup>42</sup>
Prevailing Party files Bill of Costs <sup>43</sup>	14 days after entry of judgment <sup>44</sup>	14 days after entry of judgment <sup>44</sup>	
Objections to Bill of Costs	14 days after service of the bill of costs <sup>45</sup>	14 days after service of the bill of costs <sup>45</sup>	
Filing of Petition for Rehearing or for Rehearing En Banc <sup>46</sup>	45 days after entry of judgment <sup>47</sup>	45 days after entry of judgment <sup>47</sup>	Longer period than normal because case involves the United States <sup>48</sup> No response or answer filed <sup>49</sup>
Issuance of Mandate to lower court <sup>50</sup>	Later of (i) 7 days after expiration of time for filing petition for rehearing or (ii) 7 days after entry of order denying petition for rehearing, rehearing en banc, or motion for stay of mandate <sup>51</sup>	Later of (i) 7 days after expiration of time for filing petition for rehearing or (ii) 7 days after entry of order denying petition for rehearing, rehearing en banc, or motion for stay of mandate <sup>52</sup>	

EVENT	DEADLINE TAX COURT APPEAL <sup>2</sup>	DEADLINE DISTRICT COURT APPEAL <sup>3</sup>	POTENTIAL PITFALLS AND PROCEDURAL ISSUES
Filing of Petition for Writ of Certiorari (9,000 word limit) <sup>53</sup>	Later of (i) 90 days after entry of judgment or (ii) 90 days after petition for rehearing is denied or (iii) if petition for rehearing is granted, 90 days after subsequent judgment is entered <sup>54</sup>	Later of (i) 90 days after entry of judgment or (ii) 90 days after petition for rehearing is denied or (iii) if petition for rehearing is granted, 90 days after subsequent judgment is entered <sup>54</sup>	Time runs from the date of the entry of judgment, not from the issuance date of the mandate <sup>55</sup>  Extension of time to file for good cause <sup>56</sup>
Filing of Brief in Opposition to Petition for Writ of Certiorari (9,000 word limit) <sup>57</sup>	30 days after case is placed on the docket, unless extended <sup>58</sup>	30 days after case is placed on the docket, unless extended <sup>58</sup>	Opposition brief is optional unless ordered by the court
Filing of Reply to Brief in Opposition (3,000 word limit) <sup>59</sup>	No deadline specified, but distribution to and consideration by the Supreme Court will not be delayed pending receipt of the reply brief <sup>60</sup>	No deadline specified, but distribution to and consideration by the Supreme Court will not be delayed pending receipt of the reply brief <sup>61</sup>	Reply brief is optional
Distribution to U.S. Supreme Court	10 days after brief in opposition is filed <sup>62</sup>	10 days after brief in opposition is filed <sup>62</sup>	
Disposition of Petition for Writ of Certiorari <sup>63</sup>	After consideration of petition and briefs <sup>64</sup>	After consideration of petition and briefs <sup>64</sup>	U.S. Supreme Court rarely grants petitions for writs of certiorari in tax cases, even when U.S. is the party filing the petition
Filing of Petition for Rehearing of Order denying Petition for Writ of Certiorari <sup>65</sup>	25 days after date of order of denial <sup>66</sup>	25 days after date of order of denial <sup>66</sup>	No response unless requested by the court.
Filing of Merits Brief and Joint Appendix by Petitioner <sup>67</sup>	45 days after order granting writ <sup>68</sup>	45 days after order granting writ <sup>68</sup>	
Filing of Merits Brief by Respondent	30 days after petitioner's brief is filed <sup>69</sup>	30 days after petitioner's brief is filed <sup>69</sup>	
Filing of Reply Brief by Petitioner	30 days after respondent's brief is filed <sup>70</sup>	30 days after respondent's brief is filed <sup>70</sup>	Brief must be received at least one week before oral argument.
Oral Argument	At least two weeks after due date of respondent's merits brief <sup>71</sup>	At least two weeks after due date of respondent's merits brief <sup>71</sup>	Brief must be filed on behalf of a party before that party can appear at oral argument <sup>72</sup>
Issuance of Opinion	Released immediately upon announcement from the bench <sup>73</sup>	Released immediately upon announcement from the bench <sup>73</sup>	
Entry of Judgment	Following receipt of opinion by clerk	Following receipt of opinion by clerk	Finality of Decision <sup>74</sup>
Petition for Rehearing	25 days after entry of judgment or decision <sup>75</sup>	25 days after entry of judgment or decision <sup>75</sup>	No response unless requested by the court.
Issuance of Mandate	Following entry of judgment <sup>76</sup>	Following entry of judgment <sup>76</sup>	

<sup>1</sup> **Applicable Rules.** The rules cited herein are the Rules of the Supreme Court of the United States, effective July 1, 2019 (S. Ct. Rule); the Federal Rules of Appellate Procedure, as amended through December 1, 2019 (FRAP); the Federal Rules of Civil Procedure, as amended through December 1, 2019 (FRCP); the Rules for the U.S. Court of Federal Claims (RCFC), as amended through August 3, 2020, and the Rules of the Tax Court, as amended through January 15, 2020 (T.C. Rule). Local rules of the U.S. Court of Appeals for the circuit to which the appeal is taken should always be consulted.

While the CFC has its own procedural rules referenced above, these rules generally incorporate the Federal Rules of Civil Procedure applicable to civil actions in a district court and any appeal from the CFC is subject to the same procedural rules as an appeal from a district court. Therefore, unless otherwise noted, references to a district court include the CFC.

<sup>2</sup> **Jurisdiction and Venue of Tax Court Appeals.** The U.S. courts of appeals, other than the U.S. Court of Appeals for the Federal Circuit (Federal Circuit Court of Appeals), have exclusive jurisdiction to review decisions of the Tax Court in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury. I.R.C. § 7482(a)(1).

A decision of the Tax Court may be reviewed by the U.S. Court of Appeals for the circuit (i) in which the corporation or partnership's principal place of business or principal office is located at the time it filed its petition with the Tax Court; (ii) in which the taxpayer (if other than a corporation or partnership) legally resided at the time it filed its petition with the Tax Court, or (iii) designated by the parties in a written stipulation. I.R.C. § 7482(b).

<sup>3</sup> **Jurisdiction and Venue of District Court Appeals.** The courts of appeals, other than the Federal Circuit Court of Appeals, have jurisdiction of appeals from all final decisions of the district courts of the United States. 28 U.S.C. § 1291. Appeals from reviewable decision of the district courts are taken to the court of appeals for the circuit embracing the district. 28 U.S.C. § 1294. The Federal Circuit Court of Appeals has jurisdiction of appeals from final decisions of tax cases in the CFC. 28 U.S.C. § 1295(a)(3).

<sup>4</sup> **Entry of Decision by Tax Court.** I.R.C. § 7459(c). The Tax Court enters its decision after either the parties file their agreed Rule 155 computation or the Tax Court determines the correct amount of the deficiency. T.C. Rule 155(a), (b).

<sup>5</sup> **Entry of Judgment by District Court.** FRCP 58, 79(a); FCFC 58, 79(a). A judgment must be set forth on a separate document. There is no rule similar to T.C. Rule 155 governing computations before judgment is entered. A court may withhold entry of judgment to permit the parties to submit computations showing the correct amount of the judgment to be entered. Disagreements typically are resolved by the parties' motions.

<sup>6</sup> **Final Decision.** Except for certain interlocutory orders, only final decisions of the Tax Court and the district courts may be appealed. 28 U.S.C. §§ 1291, 1295; I.R.C. § 7482. A court's decision on partnership adjustments in a partnership proceeding subject to either the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA) procedures or Bipartisan Budget Act of 2015 (BBA) procedures is treated as a final decision. I.R.C. §§ 6226(g) (TEFRA), 6234(d) (BBA). Partnerships are generally subject to the BBA procedures for years after 2017 and the TEFRA procedures for years before 2018. Because TEFRA cases are still in litigation and may be appealed after publication of this article, this article includes citations to the TEFRA statutes.

Interlocutory orders of the Tax Court and the district court may be appealed if the Tax Court or district court judge includes in the order a statement that a controlling question of law is involved as to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation. An appeal must be taken within 10 days of entry of such an order and may be heard in the discretion of the appeals court. 28 U.S.C. §§ 1292(b), 1292(d)(2); I.R.C. § 7482(a)(2); T.C. Rule 193. Usually such orders do not stay the proceedings in the Tax Court or the district court from which it was appealed. 28 U.S.C. § 1292(b); I.R.C. § 7482(a)(2).

<sup>7</sup> **Multi-Claim Petitions.** When more than one claim for relief is presented in an action or multiple parties are involved, a district court may direct the entry of a final judgment as to fewer than all of the claims or parties upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. Otherwise, any decision that adjudicates fewer than all the claims of all of the parties does not terminate the action as to any of the claims or parties and the decision is subject to revision at any time before the entry of judgment adjudicating all the claims of all of the parties. FRCP 54(b), FCFC 54(b). The application of this rule in tax cases has been the subject of many cases. According to the majority rule, this same rule also applies in Tax Court cases. See *Seven W. Enterprises, Inc. v. Comm'r*, 723 F.3d 857 (7th Cir. 2013); *New York Football Giants, Inc. v. Comm'r*, 349 F.3d 102 (3d Cir. 2003); *Nixon v. Comm'r*, 167 F.3d 920 (5th Cir. 1999); *Brookes v. Comm'r*, 163 F.3d 1124 (9th Cir. 1998); *Shepard v. Comm'r*, 147 F.3d 633 (7th Cir. 1998); see also T.C. Rule 1(b) (Federal Rules of Civil Procedure may apply in the absence of an applicable Tax Court rule). The Federal Circuit has held that all issues affecting a tax refund for a single tax year must be litigated before judgment may be entered on a "claim" under Rule 54(b). *Houston Indus. Inc. v. United States*, 78 F.3d 564 (Fed. Cir. 1996), relying on *Commissioner v. Sunnen*, 333 U.S. 591 (1948).

<sup>8</sup> **Appeal Bond—Tax Court.** A bond must be posted to stay assessment and collection of a deficiency during the period of review of a Tax Court decision. The amount of the bond is fixed by the Tax Court but may not exceed double the amount of the portion of the deficiency as to which the notice of appeal is filed. I.R.C. § 7485; T.C. Rule 192. The customary practice of the Tax Court is to make the bond equal to the tax liability plus penalties and interest calculated through the expected period of the appeal. *Barnes Theatre Ticket Service, Inc. v. Commissioner*, 50 T.C. 28 (1968), *aff'd on other grounds*, 408 F.2d 65 (7th Cir. 1969). For an appeal from a decision entered in a partnership proceeding brought under either the TEFRA or BBA procedures, the amount of the bond must be based on the Tax Court's estimate of the aggregate of the partners' deficiencies unless otherwise stipulated by the parties. I.R.C. § 7485(b).

<sup>9</sup> **Appeal Bond—District Court.** A supersedeas bond must be given by the appellant to stay execution of a judgment pending appeal. The stay is effective when the bond is approved by the court. FRCP 62; FCFC 62. Tax cases in the district court or the CFC are refund cases in which



the taxpayer already has paid the tax and interest. In a case involving a divisible tax, the refund suit and thus the judgment involves only the transaction for which the tax is paid. The posting of a bond by a taxpayer, including in a divisible tax case, normally would not be required on the appeal of such a case, as there would be no monetary judgment awarded to the United States to be stayed.

<sup>10</sup> **Notice of Appeal—Tax Court.** I.R.C. § 7483; FRAP 13(a); T.C. Rule 190(a). If a timely notice of appeal is not duly filed, the decision of the Tax Court becomes final upon the expiration of 90 days following entry of the decision. I.R.C. § 7481(a)(1). The running of the statute of limitations on assessments is suspended until the Tax Court's decision becomes final within the meaning of I.R.C. § 7481 and for 60 days thereafter. See I.R.C. §§ 6213(a), 6214(d), 6503(a)(1).

<sup>11</sup> **Notice of Appeal—District Court.** FRAP 4(a)(1)(B). The time period for filing the notice of appeal is 60 days after entry of judgment (because the United States is a party the usual 30 day appeals period does not apply). A notice of appeal filed after the district court announces a decision or order – but before the entry of the judgment or order – is treated as filed on the date of and after the entry of the judgment or order. FRAP 4(a)(2).

<sup>12</sup> **Decision to Appeal.** A taxpayer generally decides whether to appeal a tax case based on the following factors: (i) costs; (ii) the amount at issue; (iii) the precedential effect of the decision on its future tax years; and (iv) the desirability of making the Tax Court decision or district court decision final. Tax Court cases involving less than \$50,000 generally may not be appealed. I.R.C. § 7463(b). The United States makes a decision to appeal a case after considerable review by Chief Counsel, the Treasury Department, and the Department of Justice. I.R.M. §§ 36.1.1.4, 36.1.1.5, 36.1.1.6 (Aug. 11, 2004). At Chief Counsel, a recommendation to appeal or not is made by Associate Chief Counsel with possible input by Division Counsel. *Id.* § 36.1.1.5, 36.1.1.6 (Aug. 11, 2004). The Associate Chief Counsel's recommendation (and Division Counsel's, if applicable) is sent to the Appellate Section of the Tax Division of the Department of Justice. *Id.* § 36.2.1.1.5(1) (Aug. 11, 2004). The Appellate Section prepares its own memorandum to the Assistant Attorney General (Tax Division). *Id.* § 36.1.1.4(2) (August 11, 2004). If all agree, the Assistant Attorney General will send a memorandum to the Solicitor General stating the Tax Division's recommendation to appeal. *Id.* If there is disagreement, the Tax Division generally will provide an opportunity for a conference. *Id.* The recommendation is then sent to the Solicitor General's office, which makes a final, independent recommendation as to whether to appeal. *Id.* § 36.1.1.4(4) (Aug. 11, 2004). Chief Counsel considers the following factors in deciding whether to appeal: (i) the development of rational, fair, and consistent rules for the enforcement of the tax laws; (ii) impact on revenue and number of taxpayers impacted by the decision; (iii) legal principle of important precedential value; (iv) client relations; and (v) chances of success. *Id.* §§ 36.1.1.1(1), 36.2.1.1 (Aug. 11, 2004).

<sup>13</sup> **Method of Filing Notice of Appeal.** In Tax Court, all taxpayers represented by counsel must electronically file a Notice of Appeal. T.C. Rule 26(b). If a taxpayer is not represented by counsel (including taxpayers assisted by low-income taxpayer clinics and Bar-sponsored pro bono programs), a notice of appeal from a Tax Court decision may be filed either electronically ([https://www.ustaxcourt.gov/case\\_related\\_forms.html](https://www.ustaxcourt.gov/case_related_forms.html)), at the Tax Court clerk's office in D.C. or by mail addressed to the Tax Court clerk. If sent by mail, the notice of appeal is considered filed on the postmark date, subject to I.R.C. § 7502. FRAP 13(a)(2); T.C. Rule 190(a). Under I.R.C. § 7502(c), a notice of appeal sent by registered mail or certified mail is considered prima facie evidence of delivery on the postmark date. A notice of appeal from a Tax Court decision not required to be filed electronically may also be filed by any one of the designated private delivery services (PDSs) set forth in I.R.S. Notice 2016-30, 2016 I.R.B. 676. I.R.C. § 7502(f).

<sup>14</sup> **Post-Judgment Motions.** A motion to vacate or revise a Tax Court decision must be filed within 30 days after entry of the decision and terminates the running of the time for appeal. The full time for appeal commences to run and is computed from the later of the entry of an order disposing of such motion or from the entry of a new decision. T.C. Rule 162; FRAP 13(a)(1)(B).

If a party in the district court timely files any of the following motions, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion: (i) a motion for judgment under Rule 50(b); (ii) a motion to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment; (iii) a motion for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58; (iv) a motion to alter or amend the judgment under Rule 59; (v) a motion for a new trial under Rule 59; or (vi) a motion for relief under Rule 60 if the motion is filed no later than 10 days after the judgment is entered. FRAP 4(a)(4)(A); see *Maxus Energy Corp. v. United States*, 31 F.3d 1135 (Fed. Cir. 1994) (post-judgment motion filed in tax case within 10 days after entry of judgment held to be Rule 59 motion because it sought to resolve genuine ambiguities in the prior judgment). If a party files a notice of appeal after the court announces or enters a judgment, but before it disposes of any of these motions, the notice becomes effective to appeal a judgment or order when the order disposing of the last such remaining motion is entered. FRAP 4(a)(4)(B)(i). A party intending to challenge an order disposing of any of these motions or a judgment altered or amended upon such a motion must file a notice of appeal or an amended notice of appeal within 60 days after entry of the order disposing of the last such remaining motion. FRAP 4(a)(4)(B)(ii). Post-judgment motions that do not fall within the specified categories listed above will not extend the time period for filing a notice of appeal.

A district court may extend the time to file a notice of appeal if a party so moves no later than 30 days after the 60-day period and that party shows excusable neglect or good cause. FRAP 4(a)(5). A district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if the following conditions are satisfied: (i) the court finds that the moving party was entitled to notice of the entry of the judgment or order sought to be appealed but did not receive the notice from the district court or any party within 21 days after entry; (ii) the motion is filed within 180 days after the judgment or order is entered or within 7 days after the moving party receives notice of the entry, whichever is earlier; and (iii) the court finds that no party would be prejudiced. FRAP 4(a)(6). There are no similar procedures to extend the time to appeal a Tax Court decision.

<sup>15</sup> **Filing in Wrong Court.** A notice of appeal must be filed with the Tax Court or the district court, not with the circuit court of appeals. FRAP 4(a)(1), (b); T.C. Rule 190(a). If a notice of appeal is mistakenly filed in the court of appeals, the clerk of that court must note on the notice

the date when it was received and send the notice of appeal to the district clerk or Tax Court clerk. The notice is then considered filed in the district court on the date so noted. FRAP 4(d), 14.

<sup>16</sup> **Cross Appeals.** If a timely notice of appeal from a Tax Court decision is filed by one party, then any other party may take an appeal by filing a notice of appeal within 120 days after the Tax Court's decision is entered. I.R.C. § 7483; FRAP 13(a)(1); T.C. Rule 190(a).

If one party timely files a notice of appeal from a district court decision, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the normal 60-day period, whichever period ends later. FRAP 4(a)(3).

<sup>17</sup> **Joint or Consolidated Appeals.** When two or more parties are entitled to appeal from a lower court judgment or order, they may file a joint notice of appeal if their interests make joinder practicable. They may then proceed on appeal as a single appellant. If the parties file separate timely notices of appeal, the appeals may be joined or consolidated by the court of appeals. FRAP 3(b), 14. Consolidated appeals remain distinct cases, whereas a joint appeal is treated as a single appeal. The joint appellants file a single brief, and a single judgment is issued. In consolidated cases, the parties may join in a brief or a party may adopt by reference a part of another party's brief. FRAP 28(i).

<sup>18</sup> **No Automatic Voluntary Dismissal—Before Docketed.** A party has no unilateral right to dismiss an appeal. Before the case has been docketed by the circuit court, the district court may dismiss the appeal if the parties file a stipulation or on appellant's motion with notice to all parties. FRAP 42(a).

<sup>19</sup> **Service of Notice of Appeal.** The Tax Court clerk or district court clerk must serve notice of the filing of a notice of appeal by sending a copy to each party's counsel of record. The clerk must promptly send a copy of the notice of appeal and of the docket entries to the clerk of the court of appeals named in the notice. The district clerk or Tax Court clerk must note on each copy the date when the notice of appeal was filed. FRAP 3(d)(1), 14.

<sup>20</sup> FRAP 3(d)(3).

<sup>21</sup> **Docketing of Appeal from Tax Court in Circuit Court.** FRAP 12(a), 14. It is imperative to consult the circuit's local rules once the appeal has been docketed. Each circuit has its own rules supplementing FRAP, and the rules vary greatly from circuit to circuit. Local rules may require additional forms to be filed and set forth criteria for electronic filing, among other things.

<sup>22</sup> **Docketing of Appeal from District Court in Circuit Court.** FRAP 12(a). See n.21.

<sup>23</sup> **No Automatic Voluntary Dismissal—After Docketed.** A party has no unilateral right to dismiss an appeal. The circuit court may dismiss a docketed appeal if the parties file a signed dismissal agreement specifying how costs are to be paid and pay any fees that are due. An appeal may be dismissed on the appellant's motion on terms agreed to by the parties or fixed by the court. FRAP 42(b).

<sup>24</sup> **Transcript and Statement of Issues.** The transcript must be ordered only if not already on file and the appellant considers it necessary. In Tax Court cases, the transcript typically already is on file and therefore need not be ordered. If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant must include in the record a transcript of all evidence relevant to that finding or conclusion. A statement of issues must be filed only if the entire transcript will not be included in the record on appeal, so that the appellee can order necessary parts of the transcript. FRAP 10(b), 14.

<sup>25</sup> FRAP 10(b)(1).

<sup>26</sup> **Court Reporter's Transcript.** The court reporter may request an extension of time. FRAP 11(b).

<sup>27</sup> **Record on Appeal.** The record on appeal consists of the original papers and exhibits filed in the Tax Court or district court, the transcripts, and a certified copy of the docket entries prepared by the Tax Court or district court clerk. FRAP 10(a), 14. The Tax Court or district court clerk must consecutively number and bind the record on appeal before transmitting it to the circuit court. FRAP 11(b)(2), 14. If there are multiple appeals from a judgment or order, the clerk must forward a single record. FRAP 11(a).

<sup>28</sup> FRAP 11(b)(2).

<sup>29</sup> **Voluminous Lower Court Record.** Documents of unusual bulk or weight will not be transmitted unless the clerk is directed to do so by a party or by the circuit clerk. A party must make advance arrangements with the clerks for the transportation and receipt of exhibits of unusual bulk or weight. FRAP 11(b)(2), 14.

<sup>30</sup> **Briefs and Appendix.** FRAP 28 sets forth the substantive requirements for a brief. FRAP 32 contains detailed rules as to the form of briefs. FRAP 30 contains the rules for the appendix. It is imperative to consult the circuit's local rules supplementing FRAP 28, 30, and 32, as each circuit's particular requirements vary significantly. Particular attention should be paid to the rules regarding the appendix, because certain deadlines are imposed within 14 days of when the record is filed. A party may file a motion to exceed the type-volume limitations set forth in FRAP, though such motions generally are disfavored. Consult the circuit's local rules supplementing FRAP 28 and 32.

<sup>31</sup> **Appellant's Brief.** FRAP 31(a)(1). Most circuit courts will issue a briefing schedule. Consult the local rules. A party may file a motion to exceed the type-volume limitations set forth in FRAP, though such motions generally are disfavored. Consult the circuit's local rules supplementing FRAP 28 and 32.

<sup>32</sup> **Standard of Review.** The standard of review must be stated in the party's brief. FRAP 28. A court of appeals has authority to review decisions of the Tax Court in the same manner and to same extent as a decision of the district court in a civil action tried without a jury. I.R.C. § 7482(a)(1).

<sup>33</sup> **Appellant's Failure to File Brief.** If an appellant fails to timely file a brief, an appellee can move to dismiss the appeal. FRAP 31(c).

<sup>34</sup> **Appellee's Brief.** FRAP 28, 32. A party may file a motion to exceed the type-volume limitations set forth in FRAP, though such motions generally are disfavored. Consult the circuit's local rules supplementing FRAP 28 and 32.

<sup>35</sup> FRAP 31(a)(1). A person represented by an attorney must file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule. FRAP 25(a)(2)(B).

<sup>36</sup> **Appellee's Failure to File Brief.** An appellee who fails to file a brief will not be heard at oral argument, unless the court grants permission. FRAP 31(c).

<sup>37</sup> **Reply Brief.** FRAP 28, 32. A party may file a motion to exceed the type-volume limitations set forth in FRAP 28 and 32, though such motions generally are disfavored. Consult the circuit's local rules supplementing FRAP 28 and 32.

<sup>38</sup> FRAP 31(a)(1). A person represented by an attorney must file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule. FRAP 25(a)(2)(B).

<sup>39</sup> **Oral Argument.** The appellant opens and concludes oral argument. FRAP 34(c). Oral argument must be allowed in every case unless a panel of three judges who have examined the briefs and record unanimously agree that oral argument is unnecessary for any of the following reasons: (i) the appeal is frivolous; (ii) the dispositive issue or issues have been authoritatively decided; or (iii) the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument. FRAP 34(a)(2). The clerk must advise all parties whether oral argument will be scheduled, and, if so, the date, time, and place for it, and the time allowed for each side. FRAP 34(b).

<sup>40</sup> FRAP 36.

<sup>41</sup> **Entry of Judgment.** A judgment is entered when it is noted on the docket. The clerk enters the judgment after receiving the court's opinion. But if the opinion directs settlement of the form of the judgment, the clerk enters the judgment following final settlement by the court. If a judgment is rendered without an opinion, the judgment will be entered as the court instructs. On the date when judgment is entered, the clerk must mail to all parties a copy of the opinion – or the judgment, if no opinion was written – and a notice of the date when the judgment was entered. FRAP 36.

<sup>42</sup> **Finality of Decision.** The judgment of any court of appeals, including a remand, is final except that it is subject to review by the U.S. Supreme Court upon certiorari in the manner provided in 28 U.S.C. § 1254. I.R.C. § 7482(a)(1). 28 U.S.C. § 1254(1) provides that cases in the courts of appeals may be reviewed by the Supreme Court “[b]y writ of certiorari granted upon the petition of any party to any civil case . . . before or after rendition of judgment or decree.” A review on writ of certiorari is not a matter of right, but of judicial discretion, and a petition for writ of certiorari will be granted “only for compelling reasons.” S. Ct. Rule 10.

**Decision Affirmed or Dismissed by Appeals Court.** If a decision of the Tax Court is affirmed or dismissed by a court of appeals, the Tax Court decision becomes final upon: (i) the expiration of the time allowed for filing a petition for certiorari if no petition for certiorari has been duly filed; (ii) the denial of the petition for certiorari; or (iii) the expiration of 30 days from the date of issuance of the mandate of the Supreme Court, if the Supreme Court directs that the decision of the Tax Court be affirmed or that the appeal be dismissed. I.R.C. § 7481(a)(2).

**Decision Modified or Reversed by Appeals Court.** If the decision of the Tax Court is modified or reversed by a court of appeals and if (i) the time allowed for filing a petition for certiorari has expired and no petition has been duly filed, (ii) the petition for certiorari has been denied, or (iii) the decision of the court of appeals has been affirmed by the U.S. Supreme Court, then the Tax Court decision rendered in accordance with the mandate of the court of appeals becomes final upon the expiration of 30 days from the time it was rendered. If within such 30-day period the IRS or the taxpayer institutes proceedings to have such decision corrected to accord with the mandate, however, the decision of the Tax Court becomes final when so corrected. I.R.C. § 7481(a)(3)(B).

**Rehearing.** If the Supreme Court orders a rehearing or if the case is remanded by the court of appeals for a rehearing and if (i) the time allowed for filing a petition for certiorari has expired and no petition has been duly filed, (ii) the petition for certiorari has been denied, or (iii) the decision of the court of appeals has been affirmed by the U.S. Supreme Court, the Tax Court decision rendered upon such rehearing becomes final in the same manner as though no prior decision of the Tax Court was rendered. I.R.C. § 7481(a)(4).

<sup>43</sup> **Bill of Costs.** In cases involving the United States, costs will be awarded for or against the United States only if authorized by law. FRAP 39(b)

<sup>44</sup> FRAP 39(d)(1).

<sup>45</sup> **Objections to Bill of Costs.** FRAP 39(d)(2).

<sup>46</sup> **Petition for Rehearing or for Rehearing En Banc.** A petition for rehearing is intended to bring to the panel's attention claimed errors of fact or law in the opinion. A rehearing en banc is not favored and will not be ordered unless (i) the panel decision conflicts with a decision of the U.S. Supreme Court or of the court to which the petition is addressed and consideration by the full court is necessary to secure or maintain uniformity of its decisions or (ii) the proceeding involves a question of exceptional importance. FRAP 35.

<sup>47</sup> FRAP 35(c), 40(a)(1).

<sup>48</sup> FRAP 35, 40. The time period is lengthened for all parties from 14 days because an agency of the United States is a party. The enlarged time recognizes that the Solicitor General needs time to review the merits of a case before requesting a rehearing.

<sup>49</sup> **No Response to Petition.** No response or answer to a petition for rehearing or a suggestion for a rehearing in banc is filed unless requested by the court. Usually a rehearing will not be granted absent such a request. FRAP 35, 40(a)(3).

<sup>50</sup> **Mandate.** The mandate consists of a certified copy of the judgment, a copy of the circuit court's opinion, and any direction as to costs. FRAP 41(a).

<sup>51</sup> FRAP 41(b). The Internal Revenue Code specifies that the courts of appeals and the U.S. Supreme Court have “the power to affirm or, if the decision of the Tax Court is not in accordance with law, to modify or reverse the decision of the Tax Court, with or without remanding the case for a rehearing, as justice may require.” I.R.C. § 7482(c)(1).

<sup>52</sup> FRAP 41(b). The U.S. Judiciary Code allows the Supreme Court or any other court of appellate jurisdiction to “affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review” and to “remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.” 28 U.S.C. § 2106.

<sup>53</sup> **Petition for Writ of Certiorari.** S. Ct. Rule 33.1(g)(i).

<sup>54</sup> S. Ct. Rule 13.

<sup>55</sup> S. Ct. Rule 13.3.

<sup>56</sup> **Extension of Time to File Petition.** For good cause, a Justice may extend the time period for up to 60 days. An application must be filed with the clerk at least 10 days before the date that the petition is due, except in extraordinary circumstances. An application to extend time is disfavored. S. Ct. Rule 13.5.

<sup>57</sup> **Brief in Opposition.** S. Ct. Rule 33.1(g)(ii). The filing of a brief in opposition to a petition for writ of certiorari is not mandatory. If a brief in opposition is filed, it should address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted. Any objection to consideration of a question presented based on what occurred in the proceedings below, if the objection does not go to jurisdiction, may be deemed waived unless called to the Court’s attention in the brief in opposition. S. Ct. Rule 15.

<sup>58</sup> **Extension of Time to File Brief in Opposition.** S. Ct. Rule 15. A party seeking an extension of time must write a letter to the clerk explaining the reasons for the extension and serve the letter on all other parties. A party aggrieved by the clerk’s action may seek review by a Justice or the Court.

<sup>59</sup> **Reply Brief.** S. Ct. Rule 33.1(g)(iii). The reply brief should address new points raised in the brief in opposition.

<sup>60</sup> S. Ct. Rule 15.6.

<sup>61</sup> S. Ct. Rule 15.6.

<sup>62</sup> **Distribution to Supreme Court.** S. Ct. Rule 15.5. If no brief in opposition is filed, the petition will be submitted to the U.S. Supreme Court upon receiving an express waiver of the right to file a brief in opposition or, if no waiver or brief in opposition is filed, upon the expiration of the time allowed for filing.

<sup>63</sup> **Disposition of Petition for Writ of Certiorari.** The order may be a summary disposition on the merits or the grant or denial of the petition for writ of certiorari. A petition for writ of certiorari will be granted only for compelling reasons. The U.S. Supreme Court considers the following factors when considering a petition for a writ of certiorari to review a decision of a U.S. Court of Appeals: (i) whether the decision conflicts with the decision of another U.S. Court of Appeals on the same important matter; (ii) whether the decision conflicts with a state court of last resort on an important federal question; (iii) whether the court has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court’s power of supervision; (iv) whether the court has decided an important question of federal law that has not been, but should be, settled by the Supreme Court; or (v) whether the court has decided an important federal question in a way that conflicts with relevant decisions of the Supreme Court. A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law. S. Ct. Rule 10.

<sup>64</sup> S. Ct. Rule 16. After considering the documents filed by the parties, the Court will enter an appropriate order. There is no time period specified; the length of time often depends on whether the Supreme Court is in session when the petition for writ of certiorari is filed. The decision of the Tax Court becomes final upon denial of a petition for certiorari when a U.S. Court of Appeals has affirmed the decision of the Tax Court or dismissed the appeal. I.R.C. § 7481(a)(2)(B).

<sup>65</sup> **Petition for Rehearing of Denial of Petition for Writ of Certiorari.** The grounds of the petition for rehearing must be limited to intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented. No response to the petition for rehearing will be accepted unless requested by the Court. The Court will not grant a petition for rehearing without first requesting a response, absent extraordinary circumstances. The Court will not accept any amicus curiae briefs for either side. S. Ct. Rule 44.

<sup>66</sup> S. Ct. Rule 44.1.

<sup>67</sup> **Joint Appendix.** The joint appendix shall contain: (a) the relevant docket entries in all courts below; (b) any relevant pleadings, jury instructions, findings, conclusions, or opinions; (c) the judgment, order, or decision under review; and (d) any other parts of the record that the parties particularly want to bring to the Court’s attention. If any one of these documents has already been filed in connection with the petition, the brief in opposition, or a motion to dismiss or affirm, then such document need not be reproduced. S. Ct. Rule 26.1. The parties are encouraged to agree on what is included in the joint appendix. S. Ct. Rule 26.2.

<sup>68</sup> **Filing of Brief and Appendix by Petitioner.** S. Ct. Rule 25.1, 26.1. An application to extend the time to file a brief on the merits is not favored. S. Ct. Rule 25.5. The Clerk may allow preparation of the joint appendix to be deferred until 14 days after the appellant receives the brief of appellee. S. Ct. Rule 26.

<sup>69</sup> **Filing of Brief by Respondent.** S. Ct. Rule 25.2.

<sup>70</sup> **Reply Brief.** S. Ct. Rule 25.3. Any reply brief must actually be received by the clerk not later than one week before oral argument.



<sup>71</sup> **Oral Argument.** S. Ct. Rule 27, 28. Oral arguments are normally conducted from October through April. A two-week session is held each month with arguments scheduled on Monday through Wednesday of each week. Each side is allowed one-half hour for argument. The petitioner opens and concludes the oral argument.

<sup>72</sup> S. Ct. Rule 28.6.

<sup>73</sup> **Supreme Court Opinion.** S. Ct. Rule 41.

<sup>74</sup> **Finality of Decision.** If a decision of the Tax Court is modified or reversed by the U.S. Supreme Court, the Tax Court decision rendered in accordance with the mandate of the Supreme Court becomes final upon the expiration of 30 days from the time it was rendered. If within such 30-day period the government or the taxpayer institutes proceedings to have such decision corrected to accord with the mandate, however, the decision of the Tax Court becomes final when so corrected. I.R.C. § 7481(a)(3)(A).

If the Supreme Court orders a rehearing or if the case is remanded by the U.S. Court of Appeals for a rehearing and if (i) the time allowed for filing a petition for certiorari has expired and no petition has been duly filed, (ii) the petition for certiorari has been denied, or (iii) the decision of the U.S. Court of Appeals has been affirmed by the U.S. Supreme Court, the Tax Court decision rendered upon such rehearing becomes final in the same manner as though no prior decision of the Tax Court was rendered. I.R.C. § 7481(a)(4).

<sup>75</sup> **Rehearing.** S. Ct. Rule 44.1. A response to a petition for rehearing is filed only upon the Court's request. A petition for rehearing is not subject to oral argument and will not be granted except by a majority of the Court, at the instance of a Justice who concurred in the judgment or decision.

<sup>76</sup> **Mandate.** A formal mandate does not issue unless specifically directed. Instead, the Supreme Court clerk will send the court of appeals a copy of the opinion or order of the Supreme Court and a certified copy of judgment. S. Ct. Rule 45.3.