A Comparative Look at Selected Procedural Issues
United States Tax Court

I. Jurisdiction

–The Tax Court is the only court within the U.S. Federal government devoted exclusively to tax matters, and it is the only court where a taxpayer can challenge the determination of the Internal Revenue Service without first having to pay the disputed tax liability.

–As an alternative to petitioning the Tax Court, taxpayers may also pay the disputed tax, file an administrative claim for a refund, and if the claim is denied file a refund suit in a Federal District Court or in the Court of Federal Claims.

–The Tax Court adjudicates more than 95 % of the tax cases filed by taxpayers nationally and, for fiscal year 2013, had approximately 71% of the total dollars in dispute ($22 billion) in its inventory.

--Many of the taxpayers who come before the Court represent themselves. As of September 30, 2014, there were 27,777 cases pending in the Tax Court, and 19,908 of those cases, or approximately 72%, were brought by taxpayers representing themselves.
--The Court's core deficiency jurisdiction is over income tax, estate, gift, and generation-skipping transfer taxes, certain excise taxes, and certain additions to tax, additional amounts, and penalties. These issues generate the vast majority of the Court's pending caseload at any given time.

--The Court also has jurisdiction over other types of actions including, but not limited to:
-- declaratory judgment actions involving tax-exempt organizations, retirement plans, certain Government obligations
-- partnership actions
-- disclosure actions relating to written determinations by the Service
--claims for reasonable litigation and administrative costs
--transferee and fiduciary liability actions
--relief from joint and several liability of spouses who file joint returns
--collection actions
--appeals of whistleblower determinations

II. Burden of Proof

--Tax Returns: The internal revenue laws require taxpayers to calculate their own tax liabilities, pay the tax due, and file returns showing the calculations.

–Administrative Tax Assessment

–After examination, IRS may assert a deficiency. Before assessing the deficiency, the IRS must issue the taxpayer a notice of deficiency, which gives the taxpayer 90 days to file a petition in the Tax Court. (Alternatively, the taxpayer can pay the assessment and file a refund suit in Federal District Court or the Court of Federal Claims.)

–The notice of deficiency will usually explain the adjustments, but the deficiency notice does not restrict the grounds or arguments that the IRS can ultimately present court in support of the deficiency

--The Tax Court

–The Tax Court has jurisdiction to redetermine the correct amount of the deficiency, which might be greater or less than was determined in the notice of deficiency.

–New Arguments/New Proof

–The Tax Court's review is de novo; its determination is based on the merits of the case and not any previous record developed at the administrative level.

--Burden of Proof

– The burden of proof is generally upon the petitioner to show error in the IRS's determination.

–By statute, if the taxpayer in court introduces credible evidence on a disputed factual issue, the burden of proof may shift to the IRS as to that issue.

--The IRS has the burden of proof for any new matter, increases in the deficiency, or affirmative defenses it might assert in court.

–Civil tax fraud–the IRS must prove fraud by clear and convincing evidence. (The Tax Court has no criminal jurisdiction.)

–For penalties other than fraud, the IRS may have the burden of production requiring it to present sufficient evidence to persuade the court that it is appropriate to impose the additions. The taxpayer then has the burden to establish any available defenses.

III. Expert Witnesses

A party who calls an expert witness generally must cause that witness to prepare a written report for submission to the Court and to the opposing party before trial. The report must set forth in detail the reasons for the expert's conclusions

--The report will generally be received as the testimony of the expert witness, unless the Court determines that he or she is not qualified as an expert

--Admissibility of expert testimony requires two preliminary determinations by the court:

1. Whether expert testimony could assist trier of fact in understanding the evidence
2. Whether the witness called is properly qualified to give the testimony sought

-- Expert may base opinion on:

1. Firsthand observation of facts, data or opinions perceived by him before trial
2. Facts, data or opinions presented at trial
3. Facts, data or opinions presented outside of court (need not be admissible in evidence) if of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject

-- Court may on its own motion or motion of parties enter order to show cause why expert witness should not be appointed.

IV. Recusal

Terminology: Recusal and Disqualification

Situation in which a judge disqualifies or removes himself or herself from a particular proceeding because of a conflict of interest, lack of impartiality, or personal bias or prejudice.

Active / passive role of the judge

• Applicable federal statutes use DISQUALIFICATION broadly to embrace withdrawal on motion and suasponte, and do not refer to RECUSAL.

However, some distinguish between recusal and disqualification as follows:

Active = withdrawal on the judge's own initiative = RECUSAL (EXCUSAL in the Netherlands)

Passive = withdrawal on the motion of a party = DISQUALIFICATION (RECUSAL in the Netherlands)***Numbers***

Tax Court Motions for Recusal / Disqualification Filed

	2010	*2011*	*2012*	*2013*	*2014**	***TOTAL***
Motions for Recusal Filed	*4*	*3*		*7*	*5*	***19***
*# Denied***	*4*	*3*		*7*	*5*	***19***
# Granted						***0***

** Data through October 10, 2014.*
*** All denied motions were filed by petitioner(s) – none by respondent.*

ACTIVE – Disqualification / Recusal on the Judge's Own Initiative

28 U.S.C. §455 and Canon 3C of the Code of Judicial Condcut– mandatory recusal provisions apply and a judge has a duty to disqualify himself or herself if he or she knows of a ground for recusal under those provisions, regardless of any action of the parties.

- To deter unhappy litigants from abusing recusal statute and to promote faith in the judicial system, a judge has as much obligation **NOT** to recuse himself or herself where there is no reason to do so as he or she does to recuse when it is proper. §455(a), SeeS.E.C. v. Bilzerian, 729 F. Supp. 2d 19 (D. D.C. 2010).
- While motions to recuse may be referred to a judicial colleague for review, they are **typically decided by the presiding judge**.
- Suasponte recusal is unnecessary if the parties consent to the judge hearing the case.

PASSIVE – Disqualification on the Motion of a Party

Recusal of whom?

- In most instances, the request for disqualification is regarding the active judge.
- Where plaintiff **sought to disqualify the entire circuit** from hearing his case on grounds that all Ninth Circuit judges had conspired to dismiss his previous suits, rule of necessity allowed panel to review dismissal of suit. In denying plaintiff's motion, the court explained that "a judge is not disqualified to try a case because of a personal interest in the matter at issue if 'the case cannot be heard otherwise.'" Ignacio v. Judges of the United States Court of Appeals for the Ninth Circuit, 453 F.3d 1160 (9th 2006).

When?
• 28 U.S.C. §455 has no explicit requirement. However, most circuits require that a motion for disqualification be brought "at the earliest moment after knowledge of the facts demonstrating the basis for such disqualification." Travelers Ins. Co. v. Liljeberg Enters., Inc., 38 F.3d 1404, 1410 (5th Cir 1994).
• 28 U.S.C. §144 – An affidavit for recusal of a district judge must be timely filed "not less than 10 days before the beginning of the term [session] at which the proceeding is to be heard," unless good cause is shown for failure to file it within that time period.

Why?
• Canon 3C, Code of Conduct for United States Judges, closely tracks the language of §455. Caselaw generally analyzes and applies the statute. Thus, §455 is used here for discussion purposes.
• Grounds -- 28 U.S.C. § 455 – Mandatory for judge to disqualify – §455(a) operates as a "catchall" provision, while §455(b) requires disqualification/recusal in specific circumstances. SeeLiteky v. U.S., 510 U.S. 540, 552-53 (1994).

§ 455(a) - in any proceeding in which the judge's impartiality might reasonably be questioned

- Any doubts must be resolved in favor of recusal. SeeIn re Moody, 755 F.3d 891 (11th Cir. 2014).
- **Objective Standard:** Congress enacted §455(a) to "promote public confidence in the impartiality of the judicial process," Lijeberg v. Health Services Acquisition Corp, 486 U.S. 847, 860 (1988), so that "what matters is not the reality of bias or prejudice but the appearance." Liteky v. United States, 510 U.S. 540, 548 (1994); Chase Manhattan Bank v. Affiliated FM Ins. Co., 343 F.3d 120, 127 (2d Cir. 2003) ("The determination of whether such an appearance has been created is an objective one based on what a reasonable person knowing all the facts would conclude.").

§ 455(b)(1) - where the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.

- A showing of bias warranting recusal generally must be based on extra-judicial conduct and not conduct that arises in a judicial context unless the conduct displays a deep-seated favoritism or antagonism that would make fair judgment impossible. Liteky v. United States, 510 U.S. 540, 555 (1994);
- **Subjective Standard:** "to determine whether [the judge] can be truly impartial when trying the case." United States v. Holland, 519 F.3d 909, 913 (9th Cir. 2008).

§ 455(b)(2) - where the judge in private practice served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law, or the judge or such lawyer has been a material witness concerning the matter;
§ 455(b)(3) - where the judge has served in governmental employment and in such capacity participated as counsel, adviser, or material witness concerning matter, or expressed an opinion concerning merits of particular case in controversy;

§ 455(b)(4) - where judge knows there is a financial interest that could be substantially affected by the outcome of the proceeding (of judge, individually or as a fiduciary, or judge's spouse or minor child residing in household)

§455(f) – Provides a limited opportunity for judges to avoid the need to disqualify themselves for financial interest under §455(b)(4) through **divestiture**.
→TAX COURT: Gateway Hotel Partners, LLC, Gateway Interest Acquisition Corp., Tax Matters Partner, Et Al v. Commissioner, T.C. Memo. 2009-128. Order, dated January 27, 2014: Judge Goeke states that he discovered he held ownership of stock in a relevant corporation, that the ownership interest represents less than one percent of his immediate families' securities holdings and less than a half percent of immediate families' total net worth. Entire holding sold and gain portion of proceeds donated to charity. Pursuant to Canon 3C(4) and 28 USC §455(f), judge determined that disqualification not appropriate at the late date in the consolidated cases, and also determined that, based on public financial information, that his previously held interest was not substantially affected by the disposition of the cases – jurisdiction retained.

§ 455(b)(5) Judge or judge's spouse, or a person within the third degree of relationship to either of them:

(I) is a party to the proceeding, or an officer, director, or trustee of a party;
(ii) is acting as a lawyer in the proceeding;
(iii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;
(iv) is likely to be a material witness

Waiver of Disqualification

§ 455(e) provides that waiver of a ground for disqualification based on § 455(a) "may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification"; waiver under § 455(b) is not permissible.

Canon 3D, Code of Conduct for United States Judges
Remittal of Disqualification. Instead of withdrawing from the proceeding, a judge disqualified by Canon 3C(1) may, except in the circumstances specifically set out in

subsections (a) through (e), disclose on the record the basis of disqualification. The judge may participate in the proceeding if, after that disclosure, the parties and their lawyers have an opportunity to confer outside the presence of the judge, all agree in writing or on the record that the judge should not be disqualified, and the judge is then willing to participate. The agreement should be incorporated in the record of the proceeding.

Frequent considerations of the disqualification chamber

• Burden of proof: Presumption of impartiality

Any party may seek recusal, even the party in whose favor the alleged partiality exists. Judges are presumed to be impartial, and **party seeking recusal of judge must bear substantial burden** of proving otherwise. See, e.g., Roe v. St. Louis Univ., 746 F.3d 874 (8th Cir. 2014).

• Procedural decisions: As a general rule, not grounds for recusal

Adverse rulings are not indications of bias or grounds for disqualification of a judge. See, e.g., United States v. Conforte, 624 F.2d 869, 882 (9th Cir. 1980); United States v. Carroll, 567 F.2d 955, 958 (10th Cir. 1977); United States v. Haldeman, 559 F.2d 31, 136 (D.C. Cir. 1976); United States v. Ming, 466 F.2d 1000, 1002-1004 (7th Cir. 1972).

Liteky v. United States, 510 U.S. 540, 555 (1994) – "[o]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible."

• Timeliness – §144 has time limitation specified. §455 no specified time provision.

How? Written or Oral (during hearing or trial) Motions for Disqualification/Recusal

The Disqualification / Recusal Procedure

• Judge may grant a motion for disqualification / recusal and is removed as judge in the case. A new judge and new date for hearing or trial is scheduled• The judge may deny a motion for disqualification / recusal and the case will proceed.

• In theory, a litigant has 4 potential courses of action after being denied a recusal motion: (1) a petition for rehearing; (2) an appeal after a final decision in the case; (3) an interlocutory appeal; and (4) writ relief.

Every court of appeals except the Seventh Circuit generally uses an "abuse of discretion" standard for reviewing a trial court's decision about disqualification. The Seventh Circuit sometimes applies a de novo standard of review. SeeUnited States v. Balistrieri, 779 F.2d 1191, 1203 (7th Cir. 1985).

Post-disqualification authority

• Many courts of appeal have held that, after disqualification, a judge may take no nonministerial actions with respect to the case. (Third, Fourth, and Fifth concur with First and Ninth).

V. Opinion Process and Appeals

A. United States

1. Statutory Directives for Opinions

--A report upon any proceeding and a decision thereon shall be made "as quickly as possible". The report is to include "findings of fact or opinion or memorandum opinion". 26 U.S.C. sec. 7459(a), (b).

--The report is prepared by the judge who heard the case. 26 U.S.C. sec. 7460(a).

2. Types of Opinions

--Division opinions: these officially published reports make up the body of precedents that will be afforded stare decisis deference in future cases.

--Memorandum opinions: cases involving applications of settled legal principles to routine factual circumstances. Generally not considered to have binding precedential effect, though they are sometimes cited by both the parties and the Court.

–Discretion as to whether an opinion will be designated as a division opinion or a memorandum opinion rests with the Chief Judge.

--Summary opinions: these opinions emanate from "small tax cases" (cases where petitioners elect simplified, relatively informal procedures for cases involving relatively small dollar amounts), are not subject to appellate review, and are not precedential. 26 U.S.C. sec. 7463(a).

--Bench opinions: Judge may read opinion into the transcript of proceedings upon conclusion of trial. 26 U.S.C. sec. 7459(b). Judges are encouraged to render bench opinions only if both the relevant facts and the applicable law can be readily summarized from the bench.

3. Internal Collaboration and Review

–The report is transmitted to the Chief Judge who, with the assistance of legal staff, reviews the opinion, and decides whether the opinion should be reviewed at a meeting of all the active judges (the "Court Conference").

---If the Chief Judge does not direct Court Conference review in 30 days, the report becomes the report of the Tax Court. 26 U.S.C. sec. 7460(b)

--The Chief Judge has discretion in selecting reports for court review. Generally, reports are directed for court review if they conflict with court precedents, seek to overturn regulations, and or involve novel issues with widespread application where the result may be controversial.

--At Court conference, the report is discussed and voted upon. Adoption generally requires a majority of active judges voting in person or by proxy. If the report is approved it is released as an opinion of the court, along with any concurring or dissenting opinions. If the report is rejected, it may be reassigned to the same judge or a different judge to be rewritten and once again considered by the Court conference.

4. Coordination of Issuance of Opinion and Entry of Decision

--Upon release of opinion, it is filed and served on parties. (On the day opinion is released, the Court calls parties to let them know opinion is being released.)

--If the ruling is entirely in the government's favor, decision is entered in the Court's records.

--If the ruling is entirely in the petitioner's favor, decision is not usually entered for at least 30 days to give petitioner an opportunity to move for costs.

--If the ruling is not entirely for the government or the petitioner, the Court may order the parties to make the necessary computations under Rule 155 before entering a decision in monetary terms.

--Generally, the practice under Rule 155 is for the government attorney to prepare a computation in accordance with the Court's report and submit it to the taxpayer or his counsel. If the parties are in agreement, it is signed by the taxpayer and filed with the Court for entry of decision. If the parties disagree, they may submit alternative computations to the Court, and the judge who

issued the opinion will resolve the issue, typically without the need for a hearing.

5. Public Dissemination

–Electronic access: The Court makes all its opinions available online, free of charge and in searchable form, through its website and electronic access system. Westlaw and LEXIS/NEXIS also include all Tax Court division, memorandum, and summary opinions.

--Print access: The Court officially publishes division opinions. Commercial publishers publish the Court's memorandum opinions. Summary opinions and bench opinions are not published in print versions.

6. Appeals

–Decisions in regular cases (but not small tax cases) can be appealed.

–Notice of appeal must be filed within 90 days after decision is entered.

–Tax Court decisions are appealable to one of 12 U.S. Courts of Appeals. Appeal is generally taken to the Court of Appeals in which the taxpayer's legal residence is located (for corporations, the principal place of business or principal office).

–Court of Appeals can uphold the Tax Court's decision and affirm, disagree with the decision and reverse, or affirm in part and reverse in part. The Court of Appeals can also remand the case to the Tax Court for further consideration, sometimes with instructions. The Tax Court judge may then conduct further proceedings and issue a supplemental opinion.

–A party that does not prevail in the Court of Appeals can petition the Supreme Court for a writ of certiorari within 90 days after entry of the Courts of Appeals' judgment.

–If a Court of Appeals reverses a decision of the Tax Court, the Court will not necessarily change its position in a later case appealable in a different circuit. But it the appeal lies to a Court of Appeals that has clearly ruled on an issue of law, the Tax Court will defer to that court.