

# When Tax Becomes Trial: Why Courtroom Experience Changes Federal Tax Litigation

October 5, 2026

By Janine M. Campanaro



---

Most taxpayers do not begin an IRS dispute thinking about trial. They are usually focused on a much more immediate question: Is the IRS right?

That makes sense. Tax controversies often begin with an examination, a notice, a proposed adjustment, a penalty, or a denial of a refund claim. At that stage, the dispute may feel primarily technical. What does the Internal Revenue Code say? How did the IRS calculate the adjustment? What documents support the taxpayer's position?

But when a dispute becomes serious enough that litigation is a realistic possibility, the questions become more about what you can *prove*.

First, who has the burden of proof? And then, who are the witnesses, both good and bad, and will they still be available if this case goes to trial, even if it's years from now? What documents exist? What story do they tell? And who will ultimately be deciding whether that story is credible?

That shift in mindset is critical. Federal tax litigation requires more than knowing the tax law. It requires building a case that can withstand scrutiny in a courtroom. And that process often begins long before anyone files a petition or complaint.

## What Happens Before Litigation Does Not Stay There

One of the biggest mistakes taxpayers and advisors can make is treating the administrative process as though it exists in a vacuum. It does not.

Yes, when litigation starts it is a *de novo* proceeding (Latin for starting "anew") but, what happened during the administrative process does not simply disappear when the case reaches court.

Positions taken during an audit, appeals conference, protest, refund claim, penalty response, or other administrative proceeding can follow the taxpayer into litigation. That does not mean every statement made during an IRS examination becomes binding. But explanations, documents, factual representations, and valuation positions advanced early in the dispute can later become part of the case.

If the taxpayer tells the IRS one story during the examination and a materially different story appears at trial, someone is going to ask why.

If a business tells the Service that a transaction had one purpose in response to an Information Document Request and later

relies on a different purpose in litigation, that inconsistency may affect credibility.

And if documents are not preserved because everyone assumes the dispute will be resolved administratively, litigation counsel cannot recreate them years later. At that point, you may find yourself hoping the IRS kept the document in its administrative file and produces it when needed. Hope is not a preferred legal strategy.

The administrative process is therefore not merely something to “get through” before litigation. It is often the beginning of the litigation record, even if nobody wants or expects the matter to end up in court.

That does *not* mean every response to the IRS should be drafted as though it will someday be projected onto a courtroom screen. But when the amount at stake is significant, the allegations are serious, or the dispute is unlikely to resolve quickly, it is worth asking how today’s position may affect tomorrow’s case.

## **Where the Case Is Tried Can Change the Case**

Taxpayers may have different paths to judicial review depending on the type of dispute.

The U.S. Tax Court is generally a prepayment forum. In a traditional deficiency case, that means a taxpayer can challenge the IRS’s determination without first paying the disputed tax. For many taxpayers, that is an enormous advantage.

Tax Court cases, however, are decided by judges, not juries.

The U.S. Court of Federal Claims is another federal forum for certain tax cases, but it likewise conducts bench trials rather than jury trials.

Federal district court litigation is different. Generally, the taxpayer must first pay the tax at issue, satisfy the applicable refund claim requirements, and then sue for a refund. In appropriate tax refund cases, either party may request a jury.

The government lawyers across the table are different too. In Tax Court, the government is generally represented by the IRS Office of Chief Counsel. In federal district court and the Court of Federal Claims, the United States is represented by the Department of Justice.

These differences are not cosmetic. Where the case is tried, who the opposing lawyers are, and whether the ultimate decision-maker is a tax judge or a jury can materially affect the presentation of the case, the facts that receive the most attention, the experts needed, the level of technical detail that is useful, timing, cost, and the practical leverage available to each side.

Forum is not simply a question of where a complaint gets filed. Sometimes it changes the case itself.

## **A Good Tax Position Still Has to Be Proved**

Tax cases frequently turn on facts that are far less tidy than the tax return. And by the time litigation begins, significant time has often passed. Everyone suddenly wishes the record is better and the evidence to be stronger.

It is great when a client remembers an important conversation. It is much better when the client remembers the conversation and we have the contemporaneous email confirming it.

Testimony is evidence. Testimony supported by contemporaneous documentation is better evidence.

And life happens. An employee who understood the transaction left the company three years ago. The CPA changed firms. The person responsible for maintaining the records retired. The business reason for a decision was obvious to everyone at the time, so nobody thought there was any reason to write it down.

Until there was.

That's where trial experience changes the way a dispute is evaluated. A litigator has to consider not only about whether a fact is true, but also whether it can be proved – and, when there are several ways to prove it, which one is likely the most effective. There is no such thing as an automatic win simply because the taxpayer has a strong legal argument. A technically strong tax position with a poor factual record can become a very difficult case.

## Judges and Juries Hear the Same Case Differently

One of the most significant strategic differences in federal tax litigation is whether the ultimate factfinder will be a judge or a jury.

A judge works with complicated legal disputes every day. Tax Court also lives and breathes federal tax law. That changes the presentation. Tolerance for courtroom drama tends to diminish. A Tax Court trial can involve highly technical testimony, extensive expert reports, complicated statutory frameworks, and extensive post-trial briefing. The judge has the benefit of being able to work through that factual and legal record over time.

A jury trial is fundamentally different.

Jurors generally do not arrive at the courthouse with a working knowledge of the Internal Revenue Code. They are people being asked to understand a complicated dispute, determine what actually happened, decide who they believe, and then apply the law the judge gives them. The facts matter. The story matters. Presentation matters.

And the client matters.

A technically sophisticated position can be badly damaged if the taxpayer appears evasive, inconsistent, or unable to explain why certain actions were (or were not) taken. Conversely, a complicated case can become understandable when the witnesses are credible, the documents support their explanation, and the evidence fits together in a coherent story.

Consider a promoter penalty case. The underlying tax structure and statutory requirements may be complicated. But once the dispute reaches a jury, the most important questions become remarkably direct:

- What was the arrangement?
- What did the person actually say?
- What did they know at the time?
- What did they rely on?
- What evidence supports the government's allegations?

A jury has to understand the answers. That does not mean oversimplifying the case or pretending complicated tax law is simple. It means separating what is technically interesting from what is actually important and explaining the latter in a way that someone who has never read the Internal Revenue Code can follow.

The burden of proof matters too. In many tax disputes, the taxpayer carries it. In others, including certain penalty cases, the government bears the burden on critical issues. Where a jury is legally available, deciding to give up that jury can mean giving up a meaningful strategic advantage. That decision should be made deliberately, not simply because bench trials are more familiar to most tax practitioners.

## Time Can Be Part of the Litigation Strategy

There is another important difference between judge-trying tax litigation and jury litigation that is easy to overlook: when do you get an answer?

In a jury trial, once the evidence is complete and the case is submitted, the jury deliberates and returns a verdict. The parties generally know the answer before they leave the courthouse.

A Tax Court case works differently.

After trial, many cases require extensive post-trial briefing. That process alone can take months. The judge then reviews the testimony, exhibits, proposed findings of fact, and legal arguments before issuing an opinion. There is no fixed deadline for when that opinion must issue. In a complicated case, the wait can be substantial. Sometimes it is measured in years.

And time can have a real economic cost.

In many Tax Court deficiency cases, a taxpayer does not have to pay the disputed tax while the case is pending. That is one of the great benefits of the Tax Court as a prepayment forum. But if tax ultimately remains due, interest generally continues to accrue on the unpaid liability until the taxpayer takes time to stop it.

That creates a counterintuitive reality: the least expensive forum to enter is not necessarily the least expensive forum when everything is over.

Federal district court refund litigation generally requires payment first. That can make the federal district court route more expensive upfront — and, for some taxpayers, financially impossible.

A jury case may also require concentrated discovery, experts, significant trial preparation, and greater expense over a shorter period.

But in the right case, there is value in getting an answer. A verdict can provide economic certainty while a Tax Court case may still be awaiting an opinion. That matters when interest is running. It matters when a disputed liability affects financing, financial statements, transactions, or business planning. And it matters when management has already spent years living with a tax controversy.

None of this means district court is always preferable to Tax Court. It is not. The ability to challenge an asserted deficiency without first paying it is indispensable for many taxpayers, and there are options for addressing the running of interest that should be discussed with counsel.

The point is simpler: forum selection has economic consequences as well as legal ones. The analysis should include both the cost of getting to trial and the cost of waiting for the dispute to end.

## **Trial Strategy Should Begin Before Trial**

The best time to start thinking about trial is not the week before trial. It is when the dispute first begins showing signs that it may not resolve easily.

That awareness can change relatively simple decisions. Save the IRS notice. Save the envelope it came in. Keep the mailing receipt and tracking information when something important goes to the IRS. Document when notices were actually received. Preserve the business records underlying the position. Identify the employees, accountants, consultants, and advisors who actually know what happened. Preserve the contemporaneous business reason for a decision instead of assuming someone will remember it four years later.

And when the stakes warrant it, consider bringing litigation counsel into the process before the administrative proceeding is finished.

That does not mean every audit needs a trial lawyer. Many do not. But significant cases are easier to litigate when someone

was thinking about the evidence before the evidence disappeared.

Mailing records are a surprisingly good example. The date on an IRS notice, the date it was mailed, when the taxpayer actually received it, whether it went to the correct address, and when the taxpayer responded can become critical procedural facts.

The same is true when the taxpayer sends something to the IRS. Years later, “I know we mailed it” is nowhere near as useful as the certified-mail receipt or tracking record showing that you did.

Recent ERC disputes have brought that lesson into particularly sharp focus, with taxpayers sometimes needing to establish exactly when a claim or response was mailed.

This is why one of the least glamorous pieces of litigation advice is also one of the most useful:

Save the envelope. And save the receipt.

Better yet, apply the same mindset to the entire dispute.

## **The Bottom Line**

John Adams famously told a jury during the Boston Massacre trials that “facts are stubborn things; and whatever may be our wishes, our inclinations, or the dictates of our passions, they cannot alter the state of facts and evidence.” More than 250 years later, trial lawyers are still learning the same lesson.

By the time a tax dispute reaches a courtroom, most of the facts that will decide the case have already happened. The witnesses have had the conversations. The business made the decisions. The documents were created or they were not. The IRS took its position, and the taxpayer responded.

Good tax law matters. But once tax becomes trial, being right is only part of the job. You still have to prove it.

The best litigation strategy is therefore not the one invented on the eve of trial. It is the one that began while the evidence was still available, the witnesses still remembered what happened, and the taxpayer still had choices about how – and where – to fight.