

## NEWS ANALYSIS

## A Peek Behind the Curtain at the Tax Court Exam for Non-Attorneys

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Unlike almost every other federal court, the Tax Court admits non-attorneys to practice before it, but on one condition: Practitioners seeking admission as non-attorneys (known as United States Tax Court Practitioners (USTCP)) must pass a difficult four-hour-long written exam, much like a smaller, more focused version of a bar exam.

Before 1942, when it was called the Board of Tax Appeals, the body now called the United States Tax Court freely admitted both attorneys and CPAs to practice. However, as part of the transition to court status (in 1942 it was renamed the Tax Court of the United States, and in 1969 it became an Article I court bearing its current name), some restriction on practice was expected. All three incarnations will be generally referred to as the Tax Court.

Rep. John D. Dingell Sr. wanted to preserve the ability of accountants to practice before the Tax Court and so inserted language, commonly called "the Dingell Amendment," into legislation in 1942. That language now resides in section 7452 and states that "no qualified person shall be denied admission to practice before the Tax Court because of his failure to be a member of any profession or calling."

Now that the Tax Court had to admit qualified persons to practice and "qualified" could not be defined simply as admitted to a state bar, it needed a different classification system. In 1943 the court adopted Tax Court Rule 2, governing admission to practice. That rule introduced a written examination for admission to practice before the court, and while it phrased the requirement as applying to all applicants for admission, attorneys could use their bar admissions to substitute for the test. The rule also limited an applicant to three attempts to pass the test.

Tax Court Rule 2 grandfathered in all previously admitted practitioners and so only applied to applicants beginning in 1943. In addition to the exam, Rule 2 required all applicants, including attorneys, to be U.S. citizens and to submit three letters of recommendation from practitioners already admitted to practice. Moreover, it mandated that corporations and firms could not be admitted to practice before the Tax Court. They still cannot.

Now Tax Court Rule 200, the admissions rule has been amended many times since 1943. Judge Lau-

rence J. Whalen, the current chair of the court's Committee on Admissions, Ethics, and Discipline, told Tax Analysts, "Over the years the court has changed its rules governing the non-attorney examination to facilitate the admission of non-attorneys." He said that in 1990 the court reduced the number of sponsors to two and allowed applicants to submit the letters after passing (rather than before taking) the exam. He said that in 1997 the Tax Court removed the limit of three attempts at passing the exam.

The Tax Court no longer restricts its admission to U.S. citizens, but that change grew out of the Supreme Court's holding in *In Re Griffiths*, 413 U.S. 717 (1973), that a similar condition for a state bar violated the equal protection clause, Whalen said.

Whalen also said that there are no professional or educational qualifications for the non-attorney exam. However, the Tax Court will not offer the non-attorney exam to attorneys under Tax Court Rule 200(a)(2). There is at least one example of an accounting firm attorney passing the exam and using the USTCP certification as a CPA in the 1990s, when the large accounting firms first moved into Tax Court litigation. (Prior analysis: *Tax Notes*, Apr. 21, 1997, p. 332.)

Beyond education, USTCPs have two more distinctions from lawyers. First, a lawyer can generally obtain admission to a variety of courts, restricted primarily on state bar reciprocity; a USTCP can practice only in Tax Court. In other words, only a lawyer can file a refund suit in district court or the U.S. Court of Federal Claims, or file an appeal.

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Second, while there is a tax practitioner privilege under section 7525, that privilege does not extend as far as the attorney-client privilege. While section 7525(a) creates a tax practitioner privilege for communications "to the extent the communication would be considered a privileged communication if it were between a taxpayer and an attorney," that privilege can be asserted only in noncriminal tax proceedings before the IRS or in court. Thus, any communication that could involve criminal liability, tax related or not, is subject to disclosure; the limitations on attorney-client privilege in those contexts are much smaller.

### The Exam

The Tax Court's exam for non-attorneys is given every other year; the last time was in November of

2014. Each exam date is typically announced about six months ahead of time.

The exam consists of four sections: Tax Court Rules of Practice and Procedure (25 percent of the test), the Federal Rules of Evidence (25 percent), substantive federal tax law (40 percent), and legal ethics (10 percent). An applicant must score 70 percent on each of the four sections to pass the exam. That information is part of the release announcing each new examination, along with an offer to provide the applicant with copies of the last three examinations for 50 cents a page, which works out to about \$25.

The four-hour-long exam is notoriously difficult, with reports of pass rates below 10 percent for some administrations. In response to an inquiry by Tax Analysts, the Tax Court has posted on its website pass rate statistics for the last eight exams. Over that time, 619 people took the non-attorney exam, and 84 passed it for an overall pass rate of about 13.57 percent.

Year	Number of Examinees	Number Who Passed the Exam	Pass Rate
2000	102	17	16.67%
2002	47	7	14.89%
2004	72	4	5.56%
2006	58	6	10.34%
2008	54	8	14.81%
2010	83	8	9.64%
2012	77	11	14.29%
2014	126	23	18.25%

Source: Tax Court release.

The Tax Court reports that there are currently 250 USTCPs in contrast to the 70,000 attorneys currently admitted to the Tax Court bar. Although the number is inflated by the ease of an attorney being admitted to the Tax Court, the more accurate number of 20,896 total practitioners (attorney and non-attorney alike) registered to electronically file documents with the court still illustrates the order of magnitude of the difference.

Before the inquiry by Tax Analysts, the Tax Court had made little public comment on the non-attorney exam. In response to the inquiry, the court released its procedures for the administration of the exam in addition to the statistics on passage rates for the last eight exams. Chief Judge Michael B. Thornton said, "To be more transparent, the court has added to our website information about procedures governing the preparation and grading of the non-attorney examination, and recent pass rates."

Judge John O. Colvin, a former chief judge and previously the chair of the court's Committee on Admissions, Ethics, and Discipline, described the procedures used from 1942, when the exam was first administered, until 1995, when the current procedures were instituted. "From 1942 to 1979, the court's exam was written and graded by Tax Court personnel," whereas from 1980 to 1995 law professors wrote and graded it, he said.

Colvin said that in the mid-1990s, the court began comparing its exam procedure with that of several states and other bodies such as the U.S. Patent and Trademark Office. Upon learning that many of those bodies had updated their procedures, the Tax Court refined its own.

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"In 1995, after reviewing the procedures adopted by several other admitting authorities, the court decided that the non-attorney exam should be written and graded by a panel of three law professors outside the Tax Court," Colvin said. The new procedures established the 70 percent passing threshold for each of the four parts of the exam. "The professors, not the Court, would decide whether the applicant achieved a passing score," Colvin said.

The new procedure added the opportunity for the unsuccessful applicant to obtain a copy of his answers. By moving to the current procedure, it "more closely [resembles] procedures used by numerous other admitting authorities," Colvin said.

Under the Tax Court's exam procedure, one of the three professors, referred to as the chair of the panel, operates as a general contractor, nominating the other two, as well as receiving and distributing the payment for all three. The chair also reviews and approves the "questions and answer key for consistency and uniformity."

The professors are selected for their specialized knowledge and legal testing experience. The Tax Court looks for professors from all over the country.

Unhappy applicants will not find in the procedure any chance to complain about their exam scores. Colvin said, "We have never disclosed the names of the law professors who act as outside examiners . . . to foreclose applicants from contacting them directly to raise questions about the exam procedures, the grades assigned, the best answer to a question, and so forth." The exam is the Tax Court's, and that is where inquiries should be directed, he said. Further, the procedure states that

while the exam is prepared and graded by the professors, the court approves it.

The only relief available to the unsuccessful applicant, other than copies of the graded exam, is reconsideration for clerical errors. However, the professors regrade the 10 exams that come closest to passing for each of the four sections, though the applicant will not learn whether his exam was regraded because regrading is done before the results are released.

The procedures provide that the professors grading the exams do not know the identities of the applicant; those are kept by the Tax Court. Moreover, the professors grade by question, rather than by exam. In other words, one of the three grades all responses to a particular question.

While the procedures declare that 70 percent on each portion should be the passing grade, the professors have discretion to advise the Tax Court on whether an applicant has passed the exam. They also send the final scores to the Tax Court, not just a pass or fail result.

Thornton thinks that the current procedure fulfills the Tax Court's mandate of allowing qualified individuals to practice because the model on which they are built, one that employs a panel of well-qualified legal academics as examiners, is used by other admissions authorities.

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Whalen said the Tax Court expects the professors to prepare an exam that correctly identifies non-attorney practitioners who are qualified to assist petitioners in court. The court takes that responsibility seriously, he said, adding, "We believe this approach protects Tax Court petitioners and is fair to applicants."

Colvin emphasized the importance of practitioners being able to help petitioners in the Tax Court. "Representing persons before this — or any — Federal court requires knowledge of subjects not related to becoming enrolled agents or certified public accountants," he said, adding that in the Tax Court, a practitioner should know its procedural, evidentiary, and ethical rules in addition to substantive tax law.

Tax Court Rule 200 requires that all applicants — attorneys and non-attorneys — demonstrate good moral and professional character before admission, much like a state bar exam's character and fitness review. However, it seems that this requirement has

not been a barrier for non-attorneys. "None of us involved with the admissions process here recalls a non-attorney applicant not being admitted to practice for failure to establish good moral and professional character," Whalen said.

Practitioners interested in the Tax Court non-attorney exam need not look at the passing rate and despair. Exam preparation courses are available. "We are aware that some exam prep courses are being offered, but we cannot offer any suggestion to future applicants evaluating the prep courses," Whalen said. The only other statement that the Tax Court could offer comes from the exam procedures: Exam panel professors are forbidden from participating in exam prep courses.

### **Preparing for the Exam**

Ruth Ann Michnay, a Minnesota CPA, took the non-attorney exam in 2014 and used the exam prep course offered by Sherrill Trovato of Gregory & Associates Inc.

Michnay said she first considered taking the non-attorney exam about 18 months before that year's test was offered. At that point, she enrolled in a yearlong training course, which involved monthly e-mails and assignments; multi-day training sessions, including evidence; and remote study groups.

Michnay said that on the day of the exam, she arrived at the Tax Court and was shown to one of several rooms filled with applicants. She said there were about 30 people in the room where she took the exam. The Tax Court reported that well over 100 people sat for the 2014 exam.

Once she was seated, Michnay said applicants had to wait in their seats until the exam began just after noon. "We had to be in our positions an hour before the exam, and I have to say that the hardest time is to sit there from 11 to 12 o'clock," she said.

Michnay found the exam process well executed and the administrators helpful. Stephanie A. Servoss, deputy general counsel at the Tax Court, said the court is constantly trying to make the non-attorney exam process "as comfortable and accommodating as possible, [including] looking into improving the physical space where the next exam will be offered in 2016."

Michnay contrasted the non-attorney exam with the CPA and enrolled agent exams. While the Tax Court exam requires almost all answers to be in essay form, the other two are primarily multiple choice, she said.

While Michnay mentioned in March that she was not confident about her exam performance, particularly in the evidence section, in April she reported to Tax Analysts that she had passed.

Michnay said she hoped not to have to use her USTCP designation by actually going before the Tax

Court because she would like to urge her clients against litigation. Instead, she took the exam primarily to enhance the university courses she teaches and to aid her general tax practice. "In representing clients, tax practitioners are on the front end of the Tax Court process; they are at the grass roots of the evidentiary principles I learned during the exam preparation — authentication, best evidence, and hearsay," she said.

Michnay is not alone in seeking USTCP designation for reasons other than representing clients before the Tax Court. Trovato said, "I think for a number of people, the challenge is what this is all about, it is a difficult exam, a very difficult exam, and so you reach a point in your professional career as a CPA or as an enrolled agent [and ask] 'what next?' and this is an achievable what next."

Trovato said that even for use in representing clients before the IRS, the ability to take a client to Tax Court can be most useful as a way to change how the IRS is considering the case. She added that while she never expects to try a large case before the Tax Court, a docketed case receives attention from a different part of the IRS, which can expedite settlement discussions.

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Trovato developed her exam prep course as an outgrowth of her own successful preparation for the exam. "I would develop my part of a topic for a study partner and then used that as the basis for the first text. . . . Obviously, it's grown tremendously since then," she said, adding that she has developed suggested answers for her course by working with graded answers received from unsuccessful applicants since 2002.

According to Trovato, applicants can still have a hard time finding sponsors. She said that she had difficulty finding sponsors because of the small size of the USTCP community and some lawyers' disapproval. Even though some applicants struggle, she said she has never heard of someone passing the exam and failing to find the two sponsors.

Trovato acknowledges that the non-attorney exam is difficult, but that there is a good reason for that: A USTCP can affect a Tax Court petitioner's rights. She said that she has seen the patience that the Tax Court judges extend to pro se petitioners who may not understand the system. However, the judges rightfully expect USTCPs and attorneys to

know the court procedures, she said. Thus, a poorly qualified practitioner could rob a petitioner of a valuable courtesy, especially in a small case that cannot be appealed.

Even so, Trovato said she would like to see the Tax Court make sample answers available, in addition to copies of past exams, to make it easier for candidates to understand the exam's expectations. The Tax Court did not offer to release sample answers when asked.

### Criticism

Jay Starkman, an Atlanta CPA, has been a vocal critic of the non-attorney exam since the 1990s. He thinks the automatic admission of attorneys without proof of tax knowledge is unfair. "Any guy who has a law degree and doesn't know the first thing about taxes can walk into Tax Court; I can't," he said.

Further, Starkman points to allegations of grading irregularities. His book, *The Sex of a Hippopotamus: A Unique History of Taxes and Accounting* (2008), contains a personal account.

Shortly before taking the 1994 exam, Starkman prepared a motion for litigation and administrative costs that turned out to be one of the rare awards granted in 1995. While he was taking the exam five days later, he answered the exam question "Explain the circumstances under which and the extent to which the Tax Court may award costs (including attorney fees) to a petitioner." When Starkman obtained his exam results, he discovered that his answer had received just eight out of the possible 20 points.

Starkman expressed concern over some questions involving issues that the Tax Court is currently considering. "Some of the questions they throw in there can be from a case that is pending in court." In his book, he mentions an issue tested on the 2000 exam that was the subject of a May 2001 Tax Court decision; the results of the exam were released in March 2001.

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Starkman also noted court challenges in both the 1940s and 1990s to results from the non-attorney exam stemming from grading irregularities. He said court decisions that allow an applicant asserting incorrect grading to retake an exam offered only every other year — because grading errors should

be exposed by reexamination — are “an appalling insensitivity to grading irregularities.”

Trovato said that while she has heard of some grading inconsistencies with the exam in the past, she believes the potential for USTCPs to affect a petitioner’s rights makes a challenging exam justified. “I don’t believe [the exam] is unfair; I believe it’s difficult. I believe there is a reason it’s difficult. But it can be passed,” she said. Further, she said that she always has some students who stop attending class because life interferes or because they find it more challenging than they anticipated, despite her clear statements about the level of effort required to pass the exam.

The Tax Court said it is not aware of any grading irregularities from before the current testing procedures were adopted. It also emphasized the importance of the effect USTCPs can have on petitioners’ rights and the differences between IRS and court practice.

Starkman questioned the Tax Court’s application of section 7452 in the exam and called for a Government Accountability Office investigation. “Somebody in Congress ought to ask for a GAO investigation into the Tax Court to see whether that exam is being administered the way it was intended,” he said.

“Yes, it’s difficult; yes, it’s challenging; yes, only a few people pass it; but yes, you can, you can be one of the ones who do. You must be prepared that you are going to spend a significant amount of effort and study time and resources in achieving it. I think it’s a worthy goal,” Trovato said. ■

## NEWS ANALYSIS

**When European Companies Invert**

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Cross-border moves to enhance tax savings aren’t just for U.S. multinationals, but in the European Union, where freedom of establishment is strictly enforced, views on changes in tax domicile are very different — at least for now.

When Cortendo AB, a Swedish-incorporated biopharmaceutical with headquarters in Pennsylvania, decided to move its tax domicile from Sweden to Ireland in August, it wasn’t shy about its reasons. The move “will have the effect of facilitating tax-efficient allocations of capital within the Cortendo group and permitting tax-efficient returns of capital to shareholders,” according to a company release.

That is in contrast to the trend among inverting U.S. companies, which say they want to emphasize synergies, rather than tax savings, as a key reason for a deal, said Steven Rosenthal of the Urban-Brookings Tax Policy Center. A case in point might be AbbVie Inc., which is embroiled in a lawsuit regarding whether it misled investors by understating the importance of tax benefits to its ultimately doomed merger with Shire. (Prior coverage: *Tax Notes*, Dec. 8, 2014, p. 1095.) “U.S. corporations got beaten up enough for lacking patriotism and short-changing the fisc that they just decided not to say anything,” Rosenthal said.

Not so for Cortendo, which is using a structure common among European re-domiciliations. A new Irish parent company, Cortendo PLC, will acquire outstanding ordinary shares of Cortendo AB in exchange for interests in ordinary shares of Cortendo PLC.

While it doesn’t coincide with the high-water mark of intra-European, tax-motivated re-domiciliations (around 2008, when some U.K. companies left in protest of the threat of stricter taxation of foreign profits), Cortendo’s move is not an isolated event.

In October 2014 Fiat SpA moved its headquarters from Italy to the Netherlands and its tax domicile to the United Kingdom through its merger with Chrysler Corp. The formation of Fiat Chrysler Automobiles NV had “the appearance of being a massive tax planning exercise,” Richard Murphy, director of Tax Research LLP, said at the time. John Elkann, former chair of Fiat and current chair of Fiat Chrysler, insisted that the point was to attract U.S. investors. (Prior coverage: *Tax Notes Int’l*, Sept. 1, 2014, p. 715.)