

**DESCRIPTION OF THE CHAIRMAN'S  
MARK OF THE  
"UNITED STATES TAX COURT  
MODERNIZATION ACT"**

Scheduled for Markup  
by the  
SENATE COMMITTEE ON FINANCE  
on April 19, 2005

Prepared by  
the Staff of the  
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# CONTENTS

	<u>Page</u>
INTRODUCTION .....	1
I. TAX COURT PROCEDURE.....	2
A. Jurisdiction of Tax Court Over Collection Due Process Cases .....	2
B. Authority for Special Trial Judges to Hear and Decide Certain Employment Status Cases .....	3
C. Confirmation of Tax Court Authority to Apply Doctrine of Equitable Recoupment.....	4
D. Tax Court Filing Fees .....	5
E. Appointment of Tax Court Employees .....	6
F. Expanded Use of Practice Fees.....	8
II. TAX COURT PENSION AND COMPENSATION.....	9
A. Judges of the Tax Court .....	9
B. Special Trial Judges of the Tax Court.....	12

## INTRODUCTION

The Senate Committee on Finance has scheduled a markup on April 19, 2005, of S. 661, the “United States Tax Court Modernization Act.” This document,<sup>1</sup> prepared by the staff of the Joint Committee on Taxation, provides a description of the Chairman’s mark of the “United States Tax Court Modernization Act.”

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<sup>1</sup> This document may be cited as follows: Joint Committee on Taxation, *Description of the Chairman’s Mark of the “United States Tax Court Modernization Act”* (JCX-24-05), April 15, 2005.

## **I. TAX COURT PROCEDURE**

### **A. Jurisdiction of Tax Court Over Collection Due Process Cases**

#### **Present Law**

In general, the Internal Revenue Service (“IRS”) is required to notify taxpayers that they have a right to a fair and impartial hearing before levy may be made on any property or right to property.<sup>2</sup> Similar rules apply with respect to liens.<sup>3</sup> The hearing is held by an impartial officer from the IRS Office of Appeals, who is required to issue a determination with respect to the issues raised by the taxpayer at the hearing. The taxpayer is entitled to appeal that determination to a court. The appeal must be brought to the United States Tax Court (the “Tax Court”), unless the Tax Court does not have jurisdiction over the underlying tax liability. If that is the case, then the appeal must be brought in the district court of the United States.<sup>4</sup> If a court determines that an appeal was not made to the correct court, the taxpayer has 30 days after such determination to file with the correct court.

The Tax Court is established under Article I of the United States Constitution<sup>5</sup> and is a court of limited jurisdiction.<sup>6</sup> Thus, the Tax Court may not have jurisdiction over the underlying tax liability with respect to an appeal of a due process hearing relating to a collections matter. As a practical matter, many cases involving such appeals (whether within the jurisdiction of the Tax Court or a district court) do not involve the underlying tax liability.

#### **Description of Proposal**

The proposal modifies the jurisdiction of the Tax Court by providing that all appeals of collection due process determinations are to be made to the Tax Court.

#### **Effective Date**

The proposal applies to determinations made by the IRS after the date which is 60 days after the date of enactment.

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<sup>2</sup> Sec. 6330(a).

<sup>3</sup> Sec. 6320.

<sup>4</sup> Sec. 6330(d).

<sup>5</sup> Sec. 7441.

<sup>6</sup> Sec. 7442.

## **B. Authority for Special Trial Judges to Hear and Decide Certain Employment Status Cases**

### **Present Law**

In connection with the audit of any person, if there is an actual controversy involving a determination by the IRS as part of an examination that (1) one or more individuals performing services for that person are employees of that person or (2) that person is not entitled to relief under section 530 of the Revenue Act of 1978, the Tax Court has jurisdiction to determine whether the IRS is correct and the proper amount of employment tax under such determination.<sup>7</sup> Any redetermination by the Tax Court has the force and effect of a decision of the Tax Court and is reviewable.

An election may be made by the taxpayer for small case procedures if the amount of the employment taxes in dispute is \$50,000 or less for each calendar quarter involved.<sup>8</sup> The decision entered under the small case procedure is not reviewable in any other court and should not be cited as authority.

The chief judge of the Tax Court may assign proceedings to special trial judges. The Code enumerates certain types of proceedings that may be so assigned and may be decided by a special trial judge. In addition, the chief judge may designate any other proceeding to be heard by a special trial judge.<sup>9</sup>

### **Description of Proposal**

The proposal clarifies that the chief judge of the Tax Court may assign to special trial judges any employment tax cases that are subject to the small case procedure and may authorize special trial judges to decide such small tax cases.

### **Effective Date**

The proposal is effective for any employment status proceeding in the Tax Court with respect to which a decision has not become final before the date of enactment.

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<sup>7</sup> Sec. 7436.

<sup>8</sup> Sec. 7436(c).

<sup>9</sup> Sec. 7443A.

## **C. Confirmation of Tax Court Authority to Apply Doctrine of Equitable Recoupment**

### **Present Law**

Equitable recoupment is a common-law equitable principle that permits the defensive use of an otherwise time-barred claim to reduce or defeat an opponent's claim if both claims arise from the same transaction. U.S. District Courts and the U.S. Court of Federal Claims, the two Federal tax refund forums, may apply equitable recoupment in deciding tax refund cases.<sup>10</sup> In *Estate of Mueller v. Commissioner*,<sup>11</sup> the Court of Appeals for the Sixth Circuit held that the Tax Court may not apply the doctrine of equitable recoupment. More recently, the Court of Appeals for the Ninth Circuit, in *Branson v. Commissioner*,<sup>12</sup> held that the Tax Court may apply the doctrine of equitable recoupment.

### **Description of Proposal**

The proposal confirms that the Tax Court may apply the principle of equitable recoupment to the same extent that it may be applied in Federal civil tax cases by the U.S. District Courts or the U.S. Court of Federal Claims. No implication is intended as to whether the Tax Court has the authority to continue to apply other equitable principles in deciding matters over which it has jurisdiction.

### **Effective Date**

The proposal is effective for any action or proceeding in the Tax Court with respect to which a decision has not become final as of the date of enactment.

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<sup>10</sup> See *Stone v. White*, 301 U.S. 532 (1937); *Bull v. United States*, 295 U.S. 247 (1935).

<sup>11</sup> 153 F.3d 302 (6<sup>th</sup> Cir.), *cert. den.*, 525 U.S. 1140 (1999).

<sup>12</sup> 264 F.3d 904 (9<sup>th</sup> Cir.), *cert. den.*, 535 U.S. 927 (2002).

## **D. Tax Court Filing Fees**

### **Present Law**

The Tax Court is authorized to impose a fee of up to \$60 for the filing of any petition for the redetermination of a deficiency or for declaratory judgments relating to the status and classification of 501(c)(3) organizations, the judicial review of final partnership administrative adjustments, and the judicial review of partnership items if an administrative adjustment request is not allowed in full.<sup>13</sup> The statute does not specifically authorize the Tax Court to impose a filing fee for the filing of a petition for review of the IRS's failure to abate interest or for failure to award administrative costs and other areas of jurisdiction for which a petition may be filed. The practice of the Tax Court is to impose a \$60 filing fee in all cases commenced by petition.<sup>14</sup>

### **Description of Proposal**

The proposal provides that the Tax Court is authorized to charge a filing fee of up to \$60 in all cases commenced by the filing of a petition.

### **Effective Date**

The proposal is effective on the date of enactment.

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<sup>13</sup> Sec. 7451.

<sup>14</sup> See Rule 20(a) of the Tax Court Rules of Practice and Procedure.

## **E. Appointment of Tax Court Employees**

### **Present Law**

The Tax Court is a legislative court established by the Congress pursuant to Article I of the U.S. Constitution (an “Article I” court).<sup>15</sup> The Tax Court is authorized to appoint employees, subject to the rules applicable to employment with the Executive Branch of the Federal Government (generally referred to as “competitive service”), as administered by the Office of Personnel Management.<sup>16</sup>

Employment with the Federal Executive Branch is governed by certain general statutory principles, such as recruitment of qualified individuals, fair and equitable treatment of employees and applicants, maintenance of high standards of employee conduct, and protection of employees against arbitrary action. The rules for employment in the Federal Executive Branch address various aspects of such employment, including: (1) procedures for the appointment of employees in the competitive service, including preferences for certain individuals (e.g., veterans); (2) compensation, benefits, and leave programs for employees; (3) appraisals of employee performance; (4) disciplinary actions; and (5) employee rights, including appeal rights. In addition, employees are protected from certain personnel practices (referred to as “prohibited personnel practices”), such as discrimination on the basis of race, color, religion, age, sex, national origin, political affiliation, marital status, or handicapping condition.

### **Description of Proposal**

The proposal extends to the Tax Court authority to establish its own personnel management system, similar to authority that applies to courts in the Federal Judicial Branch. Any personnel management system adopted by the Tax Court must: (1) include the merit system principles that govern employment with the Federal Executive Branch; (2) prohibit personnel practices that are prohibited in the Federal Executive Branch; and (3) in the case of an individual eligible for preference for employment in the Federal Executive Branch, provide preference for that individual in a manner and to an extent consistent with preference in the Federal Executive Branch.

The proposal requires the Tax Court to prohibit discrimination on the basis of race, color, religion, age, sex, national origin, political affiliation, marital status, or handicapping condition. The Tax Court is also required to promulgate procedures for resolving complaints of discrimination by employees and applicants for employment.

The proposal allows the Tax Court to appoint a clerk without regard to the Federal Executive Branch rules regarding appointments in the competitive service. Under the proposal, the clerk serves at the pleasure of the Tax Court.

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<sup>15</sup> Sec. 7441.

<sup>16</sup> Sec. 7471

The proposal also allows the Tax Court to appoint other necessary employees without regard to the Federal Executive Branch rules regarding appointments in the competitive service. Under the proposal, these deputies and employees are subject to removal by the Tax Court.

The proposal allows judges and special trial judges of the Tax Court to appoint law clerks and secretaries, in such numbers as the Tax Court may approve, without regard to the Federal Executive Branch rules regarding appointments in the competitive service. Under the proposal, a law clerk or secretary serves at the pleasure of the appointing judge.

The proposal exempts law clerks from the sick leave and annual leave provisions applicable to employees of the Federal Executive Branch. Any unused sick or annual leave to the credit of a law clerk as of the effective date of the proposal remains credited to the individual and is available to the individual upon separation from the Federal Government, or upon transfer to a position subject to such sick leave and annual leave provisions.

The proposal allows the Tax Court to fix and adjust the compensation of the clerk and other employees without regard to the Federal Executive Branch rules regarding employee classifications and pay rates. To the maximum extent feasible, Tax Court employees are to be compensated at rates consistent with those of employees holding comparable positions in the Federal Judicial Branch. The Tax Court may also establish programs for employee evaluations, premium pay, and resolution of employee grievances.

In the case of an individual who is an employee of the Tax Court on the day before the effective date of the proposal, the proposal preserves certain rights that the employee is entitled to as of that day. The proposal preserves the right to: (1) appeal a reduction in grade or removal; (2) appeal an adverse action; (3) appeal a prohibited personnel practice; (4) make an allegation of a prohibited personnel practice; or (5) file an employment discrimination appeal. These rights are preserved for as long as the individual remains an employee of the Tax Court.

Under the proposal, a Tax Court employee who completes at least one year of continuous service under a nontemporary appointment with the Tax Court acquires competitive service status for appointment to any position in the Federal Executive Branch competitive service for which the employee possesses the required qualifications.

The proposal also allows the Tax Court to procure the services of experts and consultants in accordance with Federal Executive Branch rules.

### **Effective Date**

The proposal is effective on the date that the Tax Court adopts a personnel management system after date of enactment of the proposal.

## **F. Expanded Use of Practice Fees**

### **Present Law**

The Tax Court is authorized to impose on practitioners admitted to practice before the Tax Court a fee of up to \$30 per year.<sup>17</sup> These fees are to be used to employ independent counsel to pursue disciplinary matters.

### **Description of Proposal**

The proposal provides that Tax Court fees imposed on practitioners also are available to provide services to *pro se* taxpayers.

### **Effective Date**

The proposal is effective on the date of enactment.

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<sup>17</sup> Sec. 7475.

## II. TAX COURT PENSION AND COMPENSATION

### A. Judges of the Tax Court

#### Present Law

The Tax Court is established by the Congress pursuant to Article I of the U.S. Constitution.<sup>18</sup> The salary of a Tax Court judge is the same salary as received by a United States District Court judge.<sup>19</sup> Present law also provides Tax Court judges with some benefits that correspond to benefits provided to United States District Court judges, including specific retirement and survivor benefit programs for Tax Court judges.<sup>20</sup>

Under the retirement program, a Tax Court judge may elect to receive retirement pay from the Tax Court in lieu of benefits under another Federal retirement program. A Tax Court judge may also elect to participate in a plan providing annuity benefits for the judge's surviving spouse and dependent children (the "survivors' annuity plan"). Generally, benefits under the survivors' annuity plan are payable only if the judge has performed at least five years of service. Cost of living increases in benefits under the survivors' annuity plan are generally based on increases in pay for active judges.

Tax Court judges participate in the Federal Employees Group Life Insurance program (the "FEGLI" program). Retired Tax Court judges are eligible to participate in the FEGLI program as the result of an administrative determination of their eligibility, rather than a specific statutory provision.

Tax Court judges are not covered by the leave system for Federal Executive Branch employees. As a result, an individual who works in the Federal Executive Branch before being appointed to the Tax Court does not continue to accrue annual leave under the same leave program and may not use leave accrued prior to his or her appointment to the Tax Court.

Tax Court judges are not eligible to participate in the Thrift Savings Plan.

Tax Court judges are subject to limitations on outside earned income under the Ethics in Government Act of 1978.

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<sup>18</sup> Sec. 7441.

<sup>19</sup> Sec. 7443(c).

<sup>20</sup> Secs. 7447 and 7448.

## **Description of Proposal**

### **In general**

The proposal makes various changes to the compensation and benefits rules that apply to Tax Court judges to eliminate disparities between the treatment of Tax Court judges and the treatment of other Federal judges.

### **Survivor annuities for assassinated judges**

Under the proposal, benefits under the survivors' annuity plan are payable if a Tax Court judge is assassinated before the judge has performed five years of service.

### **Cost-of-living adjustments for survivor annuities**

The proposal provides that cost of living increases in benefits under the survivors' annuity plan are generally based on cost of living increases in benefits paid under the Civil Service Retirement System.

### **Life insurance coverage**

Under the proposal, a judge or retired judge of the Tax Court is deemed to be an employee continuing in active employment for purposes of participation in the Federal Employees Group Life Insurance program. In addition, in the case of a Tax Court judge age 65 or over, the Tax Court is authorized to pay on behalf of the judge any increase in employee premiums under the FEGLI program that occur after April 24, 1999,<sup>21</sup> including expenses generated by such payment, as authorized by the chief judge of the Tax Court in a manner consistent with payments authorized by the Judicial Conference of the United States (i.e., the body with policy-making authority over the administration of the courts of the Federal Judicial Branch).

### **Accrued annual leave**

Under the proposal, in the case of a judge who is employed by the Federal Executive Branch before appointment to the Tax Court, the judge is entitled to receive a lump sum payment for the balance of his or her accrued annual leave on appointment to the Tax Court.

### **Thrift Savings Plan participation**

Under the proposal, Tax Court judges are permitted to participate in the Thrift Savings Plan. A Tax Court judge is not eligible for agency contributions to the Thrift Savings Plan.

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<sup>21</sup> This date relates to changes in the FEGLI program, including changes to premium rates to reflect employees' ages.

### **Exemption for teaching compensation from outside earned income limitations**

Under the proposal, compensation earned by a retired Tax Court judge for teaching is not treated as outside earned income for purposes of limitations under the Ethics in Government Act of 1978.

### **Effective Date**

The proposals are effective on the date of enactment, except that: (1) the proposal relating to cost of living increases in benefits under the survivors' annuity plan applies with respect to increases in Civil Service Retirement benefits taking effect after the date of enactment; (2) the proposal relating to FEGLI coverage applies to any individual serving as a Tax Court judge or any retired Tax Court judge on or after the date of enactment; (3) the proposal relating to payment of accrued annual leave applies to any Tax Court judge with an outstanding leave balance as of the date of enactment and to any individual appointed to serve as a Tax Court judge after such date; (4) the proposal relating to participation by Tax Court judges in the Thrift Savings Plan applies as of the next open season beginning after the date of enactment; and (5) the proposal relating to teaching compensation of a retired Tax Court judge applies to any individual serving as a retired Tax Court judge on or after the date of enactment.

## **B. Special Trial Judges of the Tax Court**

### **Present Law**

The Tax Court is established by the Congress pursuant to Article I of the U.S. Constitution.<sup>22</sup> The chief judge of the Tax Court may appoint special trial judges to handle certain cases.<sup>23</sup> Special trial judges serve for an indefinite term. Special trial judges receive a salary of 90 percent of the salary of a Tax Court judge and are generally covered by the benefit programs that apply to Federal Executive Branch employees, including the Civil Service Retirement System or the Federal Employees' Retirement System.

### **Description of Proposal**

#### **In general**

The proposal is generally designed to eliminate disparities between the treatment of special trial judges of the Tax Court and magistrate judges in courts established under Article III of the U.S. Constitution.

#### **Magistrate judges of the Tax Court**

Under the proposal, the position of special trial judge of the Tax Court is renamed as magistrate judge of the Tax Court. Magistrate judges are appointed (or reappointed) to serve for eight year terms and are subject to removal in limited circumstances.

Under the proposal, a magistrate judge receives a salary of 92 percent of the salary of a Tax Court judge.

The proposal exempts magistrate judges from the leave program that applies to employees of the Federal Executive Branch and provides rules for individuals who are subject to such leave program before becoming exempt.

#### **Survivors' annuity plan**

Under the proposal, magistrate judges of the Tax Court may elect to participate in the survivors' annuity plan for Tax Court judges. An election to participate in the survivors' annuity plan must be filed not later than the latest of six months after: (1) the date of enactment of the proposal; (2) the date the judge takes office; or (3) the date the judge marries.

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<sup>22</sup> Sec. 7441.

<sup>23</sup> Sec. 7443A.

## **Retirement annuity program for magistrate judges**

The proposal establishes a new retirement annuity program for magistrate judges of the Tax Court, under which a magistrate judge may elect to receive a retirement annuity from the Tax Court in lieu of benefits under another Federal retirement program. A magistrate judge may elect to be covered by the retirement program within five years of appointment or five years of date of enactment. A magistrate judge who elects to be covered by the retirement program generally receives a refund of contributions (with interest) made to the Civil Service Retirement System or the Federal Employees' Retirement System.

A magistrate judge may retire at age 65 with 14 years of service and receive an annuity equal to his or her salary at the time of retirement. For this purpose, service may include service performed as a special trial judge or a magistrate judge, provided the service is performed no earlier than 9-1/2 years before the date of enactment of the proposal. The proposal also provides for payment of a reduced annuity in the case a magistrate judge with at least eight years of service or in the case of disability or failure to be reappointed.

A magistrate judge receiving a retirement annuity is entitled to cost of living increases based on cost of living increases in benefits paid under the Civil Service Retirement System. However, such an increase cannot cause the retirement annuity to exceed the current salary of a magistrate judge.

Contributions of one percent of salary are withheld from the salary of a magistrate judge who elects to participate in the retirement annuity program. Such contributions must be made also with respect to prior service for which the magistrate judge elects credit under the retirement annuity program. No contributions are required after 14 years of service. A lump sum refund of the magistrate judge's contributions (with interest) is made if no annuity is payable, for example, if the magistrate judge dies before retirement.

A magistrate judge's right to a retirement annuity is generally suspended or reduced in the case of employment outside the Tax Court.

The proposal includes rules under which annuity payments may be made to a person other than the magistrate judge in certain circumstances, such as divorce or legal separation, under a court decree, a court order, or a court-approved property settlement.

The proposal establishes the Tax Court Judicial Officers' Retirement Fund (the "Fund"). Amounts in the Fund are authorized to be appropriated for the payment of annuities, refunds, and other payments under the retirement annuity program. Contributions withheld from a magistrate judge's salary are deposited in the Fund. In addition, the proposal authorizes to be appropriated to the Fund amounts required to reduce the Fund's unfunded liability to zero. For this purpose, the Fund's unfunded liability means the estimated excess, actuarially determined on an annual basis, of the present value of benefits payable from the Fund over the sum of (1) the present value of contributions to be withheld from the future salary of the magistrate judges and (2) the balance in the Fund as of the date the unfunded liability is determined.

Under the proposal, a magistrate judge who elects to participate in the retirement annuity program is also permitted to participate in the Thrift Savings Plan. Such a magistrate judge is not eligible for agency contributions to the Thrift Savings Plan.

### **Retirement annuity rule for incumbent magistrate judges**

The proposal provides a transition rule for magistrate judges in active service on the date of enactment of the proposal. Under the transition rule, such a magistrate judge is entitled to an annuity under the Civil Service Retirement System or the Federal Employees' Retirement System based on prior service that is not credited under the magistrate judges' retirement annuity program. If the magistrate judge made contributions to the Civil Service Retirement System or the Federal Employees' Retirement System with respect to service that is credited under the magistrate judges' retirement annuity program, such contributions are refunded (with interest).

A magistrate judge who elects the transition rule is also entitled to the annuity payable under the magistrate judges' retirement program in the case of retirement with at least eight years of service or on failure to be reappointed. This annuity is based on service as a magistrate judge or special trial judge of the Tax Court that is performed no earlier than 9-1/2 years before the date of enactment of the proposal and for which the magistrate judge makes contributions of one percent of salary.

### **Recall of retired magistrate judges**

The proposal provides rules under which a retired magistrate judge may be recalled to perform services for a limited period.

### **Effective Date**

The proposals are effective on the date of enactment.