DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

OFFICE OF THE CHIEF COUNSEL

September 11, 2015

Honorable Michael B. Thornton
Chief Judge
United States Tax Court
400 Second Street, N.W.
Washington, D.C. 20217

Dear Chief Judge Thornton:

Earlier this year at a Los Angeles tax conference, Judge Lauber invited suggestions for revisions to the Tax Court's Rules of Practice and Procedure for consideration by the Court. In response, we make the following proposals that would build on some of the Court's recent initiatives as well as prior proposals suggested to the Court in recent years. We are interested in engaging in a dialog with the Court and representatives of the private sector to discuss the following recommendations and to hear any other views that the Court and others may have to improve our respective operations.

Answers in Small Tax Cases. In January 2007, the Court modified Rule 173 to require the Commissioner to file answers in all small tax cases conducted under section 7463, a rule change we did not oppose when proposed by the Court. More recently, however, our experience has led us to conclude that the filing of answers in small tax cases does not assist pro se taxpayers as intended because they often misunderstand the meaning of the pleading. Pro se petitioners are often confused by the legalistic language regarding admissions and denials contained in pleadings; in some instances, petitioners have contacted our attorneys questioning why they have lost their case after being served with respondent's answer.

We therefore recommend that the Court revise Rule 173 to allow respondent to file a more helpful form of an answer in small tax cases. We propose that in such cases, the answer filed by respondent will be sufficient if it provides: (1) a general denial of the allegations of the petition; (2) the name, telephone number, and address of an IRS Chief Counsel attorney who may be contacted regarding the case; and (3) the timeframe within which it may be expected that the petitioner will be contacted by the Appeals or Settlement Officer assigned to the case. We believe that the signature/certification requirements of Rule 33(b) would be satisfied if such an answer were in conformity with a revised Rule 173. We envision this small tax case answer being electronically filed with the Court and a copy being served on the petitioner. Formal answers would still be required in cases in which respondent is required to make affirmative allegations.

This proposal would achieve the objectives of the 2007 rule change while providing more useful information to small tax case litigants than the traditional regular case answers currently provided in their cases. It would also allow for more expeditious referrals between Appeals and Counsel in respondent's offices, thereby conserving our limited resources. A more efficient handling of cases would lead to a corresponding conservation of the Court's resources as well.

Electronic Filing Requirements. Currently, Rule 26(b) provides for the electronic filing of all papers filed by parties represented by counsel. Documents excluded from e-filing are: (1) petitions and other papers as identified on the Court's website; (2) those filed by pro se petitioners and petitioners assisted by Low Income Taxpayer Clinics and Bar-sponsored pro bono programs; and (3) exceptions to the e-filing requirements as granted by the Court. We recommend that all documents filed by parties represented by counsel be e-filed, including petitions, decision documents, notices of appeal, and documents filed under seal.

The need to secure original signatures on paper settlement documents, including decisions entered under Rule 155, is the basis for many requests for additional time to resolve cases. Allowing the parties to secure electronic or handwritten signatures for electronic submission of decision documents would permit all parties to more efficiently conclude settlements, thereby also allowing the Court to more efficiently finalize cases. The use of electronic signatures on decision documents would provide even greater safeguards than handwritten signatures against the possibility of forgery. Due to the security protocols associated with their use, electronic signatures are more secure from forgery than are handwritten signatures. They are generally password-protected and unique to the specific user.

In certain cases (e.g., whistleblower actions and section 6110 disclosure actions), either the entire case file is sealed or certain documents within the file are sealed. This requires that documents in such cases be filed on paper, usually hand-delivered to the Court, which is inconvenient and burdensome on the parties as well as the Court. In addition, the Court's on-line docket sheet is unavailable even to the parties and their representatives in sealed cases. We believe that sealed documents can be securely filed electronically with the use of a cover page indicating that the document is filed under seal, which would direct that only the parties to the case and their representatives may access the information. The Court's eAccess system could be programmed to include a prompt for the filer to select whether the document is being filed under seal. We also request that parties to a sealed case and their representatives have on-line access to the Court's docket sheet in such cases.

Subpoenas. Currently, trial subpoenas are made returnable at the call of the calendar for the trial session on which a case has been calendared. Often, third-party custodians of records such as financial institutions will not produce documents subject

to a subpoena *duces tecum* until such return date. This hinders the parties' ability to adequately examine the documents and prepare for trial. The delay can also prevent the efficient presentation of evidence because the parties may be unable to stipulate to relevant documents as required by Rule 91 or otherwise authenticate them pursuant to Fed. R. Evid. 902(11). Although T.C. Rule 110 permits the parties to seek a pretrial conference, this provision does not specifically state that it is available for purposes of making the subpoena returnable at the pretrial conference, and this procedure is rarely, if ever, used for subpoenas.

In order to increase the efficiency and ability of the parties to receive, review, and stipulate to third-party documents in advance of the initial call of the trial calendar, we recommend that Tax Court Rule 147 be modified to allow for the return of subpoenas *duces tecum* directed to third-party custodians of records in advance of the trial calendar. The Court could consider scheduling hearings, including via the Electronic Courtroom, to allow for the return of subpoenas at least 30 days prior to trial. Alternatively, the Court could consider amending Tax Court Rules 74 and 147(d) to allow for a streamlined deposition process with respect to third-party custodians of records. For instance, Tax Court Rule 74(c)(2) could be amended to provide that in the case of nonconsensual depositions of third-party custodians of records, the party seeking to take the deposition is presumed to have satisfied the availability requirements of T.C. Rule 74(c)(1)(B) (depositions are an extraordinary method of discovery only available when all other means fail) and that the burden to quash the deposition subpoena should be placed on the objecting party. Alternatively, Rule 110(b) could be amended to specifically authorize a pretrial conference for subpoena purposes.

Redaction of identifying data in signature blocks of decision documents. Entered decision documents, which contain signatures blocks with the petitioner's address and telephone number, are available to the general public on the Court's website. Therefore, an entered decision gives potential bad actors enough information (deficiencies owed, a phone number, and an address) to contact a pro se taxpayer and falsely appear to be making a legitimate demand to collect a tax debt, such as in a so-called "spear phishing" attempt. Eliminating this information from the decision document would protect taxpayers.

Other documents containing a taxpayer's signature block (joint motions, pleadings, etc.) can only be accessed on the Court's website by a party or counsel of record to a case. In addition, the petitioner's contact information is not available on the electronic docket sheet, although if there is an attorney of record, the attorney's contact information is available. Decision documents are of particular concern because they contain sensitive information and are available to anyone with Internet access. We therefore recommend that the Court modify the signature requirement in Rule 23(a)(3) to provide either that decision documents no longer must contain petitioner's address and phone number or require that such information be redacted.

Imperfect Petitions: filing fee, signature, and attached notice. When imperfect petitions are filed, respondent is nevertheless required to respond as if the petition were fully in compliance with the Court's rules. However, such cases are often subsequently dismissed for failure to comply with the Court's rules or orders. Both the Court's and respondent's resources would be conserved if a response to an imperfect petition were not required pending the possible curing of the defect or the dismissal of the case.

Rule 20(d) requires the payment of a $60 filing fee at the time of the filing of the petition. The fee is waived if the petitioner establishes to the satisfaction of the Court by an affidavit or declaration containing specific financial information of the inability to make such payment. We recommend that when the filing fee is not paid, the Court issue an order directing the petitioner to either remit the fee, properly request a waiver, or face dismissal, and that respondent is not required to answer or otherwise respond to the petition until the order has been satisfied or discharged. In addition, if the order has been satisfied or discharged, the court should issue an order setting a new answer date.

Rule 34(b)(7) requires petitions to contain the signature, mailing address, and telephone number of each petitioner or petitioner's counsel, as well as counsel's Tax Court bar number. Rule 34(b)(8) provides that a copy of the notice of deficiency or liability should be attached to the petition as well as any accompanying statements as are material to the issues raised by the assignments of error. Particularly in cases lacking an attached notice of determination, respondent is often in the position of expending substantial resources to determine in the first instance what liabilities are before the Court. In this regard, Rule 34(b)(8) should be modified to add a specific reference to a notice of determination in addition to the notice of deficiency or liability already referenced in the rule. This will make clear the obligation of the petitioner to attach a copy of the jurisdictional document to the petition, which will enhance the ability of both the Court and respondent to identify jurisdictional issues at the earliest possible stage of litigation.

We recommend that when petitions are filed that are not signed, lack an attached notice of deficiency or other notice of determination, or otherwise are not in compliance with the Court's rules concerning the content of a petition, the Court issue an order directing the petitioner to cure the defect(s) or face dismissal. Respondent should not be required to answer or otherwise respond to the petition until the order has been satisfied or discharged. In addition, if the order has been satisfied or discharged, the court should issue an order setting a new answer date. These procedures would avoid the expenditure of resources by both respondent and the Court on cases later dismissed for failure to comply with the Court's rules or orders.

In addition, we have observed that the Court sometimes orders, after the original time for filing an answer has expired, that a petitioner need no longer comply with a previous order directing the filing of an amended petition. If the Court vacates the order

directing the filing of an amended petition after the original answer due date has passed, an answer filed thereafter would be untimely through no fault of respondent. Accordingly, we recommend that Rule 25(c) concerning computation of time be modified to provide that if the Court has issued an order directing the filing of an amendment, supplement, or ratification of the petition, the time for filing the responsive pleading shall begin to run from the date of service of the amendment, supplement, or ratification; and if the Court orders that a previous order for an amendment, supplement, or ratification no longer need be complied with, the time for filing the responsive pleading shall begin to run from the date of service of the latter order. This particular problem could be obviated if the Court were to set a date by which respondent should answer the petition in any such order.

Whistleblower Redactions. Rule 345 requires redactions in an electronic or paper filing to protect third parties in whistleblower cases. The rule requires a party filing a redacted document to submit the document with numbered redactions and an accompanying reference list that identifies the redacted information by number. The list must be filed under seal. In some cases, the redacted document is nearly useless because of the extent of the redactions and referring to the list is time consuming and burdensome for the parties and the Court.

We believe it would be more useful to the Court, as well as easier for the parties, to simply file a redacted copy of the document, without the numbered redactions and reference list, along with an unredacted copy of the document that the Court can keep under seal. This proposal has the added benefit of removing confusion over whether to maintain consistent redactions and reference lists throughout the case or to have separate lists for each document.

Inadvertent Disclosure of Privileged Material. We recommend that the Court promulgate a counterpart to Fed. R. Civ. P. 26(b)(5)(B), *Information Produced*. This rule provides that if information mistakenly produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved. As an alternative to requiring that the subject documents be filed under seal, the Court could allow the parties to move the Court for a determination of the privilege or work product claim.

Administrative Record in Declaratory Judgment Cases. Under Tax Court Rule 217(b), the parties are required to file with the Court the entire administrative record, fully stipulated, within 30 days after service of the answer. If the parties are unable to

file a fully stipulated administrative record, the Commissioner is required to file the entire administrative record, certified as to its genuineness by the Commissioner or an authorized official of the Commissioner, within 45 days after service of the answer. Under Rule 213(a)(3), respondent is required to make an affirmative allegation that a complete index of the contents of the administrative record to be filed with the Court (as required by Rule 217) is attached to the answer.

Administrative records in typical declaratory judgment cases are quite voluminous and require extensive redactions. In addition, the parties routinely meet after the service of the answer to discuss possible resolution of the case. As a result, motions to extend time to file the answer and/or the administrative record are routinely filed by the parties in these cases and granted by the Court. As many declaratory judgment cases are resolved prior to trial, the time spent and costs incurred by the parties on preparing a stipulated administrative record are disproportionate to the benefits realized. We therefore recommend that Rule 217(b) be changed to allow the parties to submit the entire administrative record, including the index, by a specified period prior to trial, e.g., 45 days (the same deadline for filing a Rule 91(f) motion to compel stipulation), or together with a joint motion to submit the case fully stipulated without trial under Rule 122. This is a cost-effective approach that conserves the resources of both the parties as well as the Court.

Permissive Intervention. The Tax Court does not have a rule similar to Fed. R. Civ. P. 24, which provides for permissive and mandatory intervention. In a recent case, a circuit court reversed the Tax Court and imposed mandatory intervention as of right on the Tax Court. Huff v. Commissioner, 743 F.3d 790 (11th Cir. 2014). We recommend that the Tax Court adopt a rule that authorizes the Court to exercise discretion in granting or denying permissive intervention in its cases, but does not provide for intervention as of right, which is inappropriate in Tax Court litigation affecting only the parties before the Court.

Deposition of Party Witness. Currently, Tax Court Rule 74 imposes restrictions and requirements for deposing party witnesses. Deposing party witnesses is considered an extraordinary method of discovery only available when other means of gathering information fail, and either consent of the parties or leave of the Court is required. This may be a result of the Court's objective to have the parties informally exchange information, as well as a recognition of the extensive fact gathering available during the examination stage. In large, complex cases that are extremely factual (e.g., transfer pricing cases) and where the petitioner restricts even informal access to significant fact witnesses, the restrictions/limitations imposed by this rule may hinder the preparation of a case for trial. We recommend that the Court allow non-consensual depositions of party witnesses upon notice to the party without requiring leave of the Court by motion.

Relief from Final Decision. The Tax Court currently lacks an analog to Fed. R. Civ. P. 60, *Relief from Judgment or Order*. The authority of the Tax Court to vacate a

decision that has become final is limited, applying only where there is fraud on the Court, where the Court did not acquire jurisdiction over the taxpayer, or where there is a clerical error discovered in a final decision. Cinema '84 v. Commissioner, 122 T.C. 264 (2004), citing I.R.C. § 7482(a). The Tax Court has also vacated decisions when there has been a mutual mistake, but the circuits are split on this issue. Compare Abatti v. Commissioner, 859 F.2d 115 (9th Cir. 1988) (no mutual mistake), with Reo Motors, Inc. v. Commissioner, 219 F.2d 610 (6th Cir. 1955) (mutual mistake recognized); but see Harbold v. Commissioner, 51 F.3d 618, 622 (6th Cir. 1995) (noting that Reo Motors was effectively overruled by the Supreme Court in Lasky v. Commissioner, 352 U.S. 1027 (1957). We recommend adopting a rule similar to Fed. R. Civ. P. 60(b) that allows for correction of errors in final decisions based on mutual mistake.

Courtesy Copies and Double-Sided Documents. Pursuant to the Practitioner's Guide to Electronic Case Access and Filing, e-filers must send a paper courtesy copy of any e-filed document longer than 50 pages to the assigned Judge and all other parties in the case. If no Judge is assigned to the case, the courtesy copy should be mailed to the Chief Judge. If a document is e-filed in consolidated cases, only one courtesy copy is required. The courtesy copies are to be mailed to the Court and served on the designated service person within three business days of e-filing. We recommend that the Court eliminate the courtesy copy requirement. Should the requirement remain, we recommend that the parties be allowed to use double-sided copies when filing and serving paper documents.

Calendars. Notices setting cases for trial are currently issued five months before each calendar call. We recommend that such notices be issued an additional month before the calendar call, for a total of six months. In addition, we recommend that the Clerk's office work with respondent's National Office to avoid simultaneous and adjacent calendars in multiple cities assigned to the same Area Counsel office, which can be detrimental to orderly and adequate trial preparation. This limited extra planning would help minimize the need for continuance motions resulting from the parties not having had adequate time to consider settlement or prepare for trial. For assistance in making this determination, we are attaching a list of the Tax Court trial locations (Exhibit 1, attached), identifying the Counsel office responsible for trials in those locations. We are also including a list of Counsel offices and the places of trial each Counsel office covers (Exhibit 2).

Our recommendations are offered to enhance efficiencies and provide significant cost savings for both the Court and the litigants, while still allowing the Court to provide the just, speedy, and efficient determination of cases mandated by Rule 1(d). We appreciate your thoughtful attention to these recommendations and stand ready to work with the Court and the private sector to implement any of the proposed initiatives the Court may adopt, and to answer any questions the Court may have concerning these recommendations.

Sincerely,

William J. Wilkins
Chief Counsel

Attachment: As stated

cc: Mark D. Allison
Chair, Court Practice & Procedure Committee
ABA Section of Taxation
Caplin & Drysdale
600 Lexington Avenue
21st Floor
New York, NY 10022

EXHIBIT 1

State of Place of Trial	Place of Trial Code & Description	Counsel Office
Alabama (AL)	Birmingham Mobile (S cases only go to SBNAS)	Birmingham
Alaska (AK)	Anchorage	Seattle
Arizona (AZ)	Phoenix	Phoenix
Arkansas (AR)	Little Rock	Oklahoma
California (CA) - Fresno	Fresno	Portland
California (CA)	San Francisco	San Francisco
California (CA) - Los Angeles	Los Angeles	Los Angeles, Laguna Niguel or Thousand Oaks
California (SD) - San Diego	San Diego	San Diego
Colorado (CO)	Denver	Denver
District of Columbia (DC)	Washington	Washington
Delaware (DE)	Philadelphia	Philadelphia
Florida (FL) - Jacksonville	Jacksonville Tampa Tallahassee	Jacksonville
Florida (FL) - Miami	Miami	Miami
Florida (FL) - Fort Lauderdale	Miami	Fort Lauderdale
Georgia (GA)	Atlanta	Atlanta
Hawaii (HI)	Honolulu	Honolulu
Idaho (ID)	Boise Pocatello	Portland
Illinois (IL)	Chicago Peoria	Chicago
Indiana (IN)	Indianapolis	Indianapolis
Iowa (IA)	Des Moines	Louisville
Kansas (KS)	Wichita	Kansas City
Kentucky (KY)	Louisville	Louisville
Louisiana (LA)	New Orleans Shreveport	New Orleans
Maine (ME)	Portland	Boston
Maryland (MD)	Baltimore	Baltimore
Massachusetts (MA)	Boston	Boston
Michigan (MI)	Detroit	Detroit
Minnesota (MN)	St. Paul	St. Paul
Mississippi (MS)	Jackson (S cases only go to SBNAS)	Birmingham
Missouri (MO) - Kansas City	Kansas City	Kansas City
Missouri (MO) - St. Louis	St. Louis	St. Louis
Montana (MT)	Helena Billings	Salt Lake City
Nebraska (NE) - Omaha	Omaha	Kansas City

EXHIBIT 1

Nevada (NV)	Las Vegas Reno	Las Vegas
New Hampshire (NH)	Burlington	Boston
New Jersey (NJ)	Newark	Newark
New Mexico (NM)	Albuquerque	Denver
New York (NY) - Albany	Albany	Albany
New York (NY) - Buffalo	Buffalo	Long Island
New York (NY) - Syracuse	Syracuse	Long Island
New York (NY) - Westbury	Westbury	Long Island
New York (NY) - New York, NY	New York, NY	New York
North Carolina (NC)	Winston Salem Columbia, SC	Greensboro
North Dakota (ND)	Bismark	St. Paul
Ohio (OH) - Cincinnati	Cincinnati Columbus	Cincinatti
Ohio (OH) - Cleveland	Cleveland	Cleveland
Oklahoma (OK)	Oklahoma	Oklahoma
Oregon (OR)	Portland	Portland
Pennsylvania (PA) - Philadelphia	Philadelphia	Philadelphia
Pennsylvania (PA) - Pittsburgh	Pittsburgh	Pittsburgh
Rhode Island (RI)	None	Hartford
South Carolina (SC)	Columbia	Greensboro
South Dakota (SD)	Aberdeen	St. Paul
Tennessee (TN)	Nashville Memphis Knoxville	Nashville
Texas (TX) - Austin	El Paso San Antonio	Austin
Texas (TX) - Dallas	Dallas Lubbock	Dallas
Texas (TX) - Houston	Houston	Houston
Utah (UT)	Salt Lake City	Salt Lake City
Vermont (VT)	Burlington	Boston
Virginia (VA)	Richmond Roanoke	Richmond
Washington (WA)	Seattle Spokane	Seattle
West Virginia (WV)	Charleston Huntington	Louisville
Wisconsin (WI)	Milwaukee	Milwaukee
Wyoming (WY)	Cheyenne	Denver

EXHIBIT 2

	Counsel Office		Place of Trial
Area 1	Boston		Boston, MA
			Burlington, VT
			Portland, ME
	Hartford		Hartford, CT
			Albany, NY
	Long Island		Buffalo, NY
			Syracuse, NY
	Manhattan		New York City, NY
	Newark		New York City, NY
Area 2	Philadelphia		Philadelphia, PA
	Pittsburgh		Pittsburgh, PA
	Baltimore		Baltimore, MD
	Greensboro		Winston Salem, NC
			Columbia, SC
	Richmond		Richmond, VA
			Roanoke, VA
	Washington, DC		Washington, DC
Area 3	Atlanta		Atlanta, GA
	Birmingham		Birmingham, AL
			Mobile, AL
			Jackson, MS
	Ft. Lauderdale		
	Jacksonville		Jacksonville, FL
			Tampa, FL
			Tallahassee, FL
	Miami		Miami, FL
	Nashville		Nashville, TN
			Memphis, TN
			Knoxville, TN
Area 4	Chicago		Chicago, IL
			Peoria, IL
	Cincinnati		Cincinatti, OH
	Cleveland		Cleveland, OH
			Columbus, OH
	Detroit		Detroit, MI
	Indianapolis		Indianapolis, IN
	Milwaukee		Milwaukee, WI
Area 5	Denver		Denver, CO
			Cheyenne, WY
			Albuquerque, NM
	Las Vegas		Las Vegas, NV

EXHIBIT 2

			Reno, NV
	Phoenix		Phoenix, AZ
	Salt Lake City		Salt Lake City, UT
			Helena, MT
			Billings, MT
Area 6	Austin		San Antonio, TX
			El Paso, TX
	Dallas		Dallas, TX
			Lubbock, TX
	Houston		Houston, TX
	New Orleans		New Orleans, LA
			Shreveport, LA
Area 7	Honolulu		Honolulu
	Portland		Portland, OR
			Pocatello, ID
			Boise, ID
			Fresno, CA
	Sacramento		San Francisco, CA
	San Francisco		San Francisco, CA
	Seattle		Seattle, WA
			Spokane, WA
			Anchorage, A
Area 8	Laguna Niguel		Los Angeles, CA
	Los Angeles		Los Angeles, CA
	Thousand Oaks		Los Angeles, CA
	San Diego		San Diego, CA
Area 9	Kansas City		Kansas City, MO
			Omaha, NE
			Council Bluffs, IA
			Wichita, KS
	Louisville		Louisville, KY
			Charleston, WV
			Des Moines, IA
	Oklahoma City		Oklahoma City, OK
			Little Rock, AR
	St. Louis		St. Louis, MO
	St. Paul		St. Paul, MN
			Bismarck, SD
			Aberdeen, SD