UNITED STATES TAX COURT
WASHINGTON, D.C. 20217

NOTICE OF PROPOSED AMENDMENTS TO RULES

Pursuant to section 7453 of the Internal Revenue Code of 1986, the United States Tax Court hereby gives notice that it proposes the attached amendments to its Rules of Practice and Procedure and invites public comment thereon. Written comments must be received by September 6, 2005. Comments must be addressed to:

Robert R. Di Trolio
Clerk of the Court
U.S. Tax Court
400 2nd St., N.W., Room 111
Washington, D.C. 20217

Absent further notice, these amendments will take effect on September 20, 2005. These amendments shall have such effect on pending proceedings as the Court may order.

The proposed amendments and explanations are as follows:

I. Rulemaking Authority

Rule 1 is deleted and replaced with the following.

Proposed RULE 1. RULEMAKING AUTHORITY; PUBLICATION OF RULES AND AMENDMENTS; CONSTRUCTION

(a) Rulemaking authority: The United States Tax Court may, after giving appropriate public notice and an opportunity for comment, make and amend rules governing its practice and procedure in all cases and proceedings before it. Where in any instance there is no applicable rule of procedure, the Court or the Judge before whom the matter is pending may prescribe the procedure, giving particular weight to the Federal Rules of Civil Procedure to the extent that they are suitably adaptable to govern the matter at hand.

(b) Publication of Rules and Amendments: When new rules or amendments to these rules are proposed by the Court, notice of such proposals and the ability of the public to comment shall be provided to the bar and to the general public and shall be posted on the

Court's Internet Web site. If the Court determines that there is an immediate need for a particular rule or amendment to an existing rule, it may proceed without public notice and opportunity for comment, but the Court shall promptly thereafter afford such notice and opportunity for comment.

(c) Construction: The Court's Rules shall be construed to secure the just, speedy, and inexpensive determination of every case.

Explanation

In Ballard v. Commissioner, 544 U.S. __, __ n.1, 125 S.Ct. 1270, 1275 n.1 (2005), the United States Supreme Court commented on the Tax Court's lack of public rulemaking procedures, stating that:

> Unlike other judicial and administrative bodies, the Tax Court does not maintain a formal practice of publicly disclosing proposed amendment to its Rules. * * * Although the Tax Court solicits comments on proposed rules changes from the American Bar Association's Section on Taxation * * *, the court apparently does not publish its proposals to, or accept comments from, the general public.

The authority and procedures for promulgating rules by the Federal judiciary are set forth in the Rules Enabling Act, 28 U.S.C. secs. 2071-2077 (2000). Section 2071 of title 28 provides:

§ 2071. Rule-making power generally

(b) Any rules prescribed by a court, other than the Supreme Court, under subsection (a) shall be prescribed only after giving appropriate public notice and an opportunity for comment. Such rule shall take effect upon the date specified by the prescribing court and shall have such effect on pending proceedings as the prescribing court shall order.

* * * * * * *

(e) If the prescribing court determines that there is an immediate need for a rule, such court may proceed under this section without public notice and opportunity for comment, but such court shall promptly

thereafter afford such notice and opportunity for comment.

Although the Rules Enabling Act does not apply to the Tax Court (section 405 of the Federal Courts Studying Act of 1988, Pub. L. 100-702, 102 Stat. 4652, provided that "The amendments made by this title [effective December 1, 1988] shall not affect the authority of the Tax Court to prescribe rules under section 7453 of the Internal Revenue Code of 1986."), the Tax Court proposes to amend its Rule 1 to provide for public notice and an opportunity for public comment.

II. Procedures To Be Followed Upon Reassignment of a Case From a Special Trial Judge to a Presidentially Appointed Judge

Paragraph (e) of Rule 182 is added as follows and Rule 183 is deleted and replaced with the following. [Rule 182(a), (b), (c), and (d) remain unchanged and are omitted here.]

Proposed RULE 182. CASES IN WHICH THE SPECIAL TRIAL JUDGE IS AUTHORIZED TO MAKE THE DECISION

(e) Procedure in Event of Assignment to a Judge: In the event the Chief Judge decides to assign a case (other than a small tax case) to a Judge to prepare a report in accordance with Code section 7460 and to make the decision of the Court, the proposed findings of fact and opinion previously submitted to the Chief Judge shall be filed as the Special Trial Judge's recommended findings of fact and conclusions of law. Thereafter, the procedures of Rule 183(b) and (c) shall apply.

Proposed RULE 183. OTHER CASES

Except in cases subject to the provisions of Rule 182 or as otherwise provided, the following procedure shall be observed in cases tried before a Special Trial Judge:

(a) Trial and Briefs: A Special Trial Judge shall conduct the trial of any assigned case. After such trial, the parties shall submit their briefs in accordance with the provisions of Rule 151. Unless otherwise directed, no further briefs shall be filed.

(b) Special Trial Judge's Recommendations: After all the briefs have been filed by all the parties or the time for doing so has expired, the Special Trial

Judge shall file recommended findings of fact and conclusions of law and a copy of the recommended findings of fact and conclusions of law shall be served in accordance with Rule 21. Within 45 days after the service of the recommended findings of fact and conclusions of law, a party may serve and file specific, written objections to the recommended findings of fact and conclusions of law. A party may respond to another party's objections within 30 days after being served with a copy thereof. The above time periods may be extended by the Special Trial Judge. After the time for objections and responses has passed, the Chief Judge shall assign the case to a Judge for preparation of a Report in accordance with Code section 7460.

(c) Action on the Recommendations: The Judge to whom the case is assigned may adopt the Special Trial Judge's recommended findings of fact and conclusions of law, or may modify or reject them in whole or in part, or may direct the filing of additional briefs, or may receive further evidence, or may direct oral argument, or may recommit the recommended findings of fact and conclusions of law with instructions. Due regard shall be given to the circumstance that the Special Trial Judge had the opportunity to evaluate the credibility of witnesses, and the findings of fact recommended by the Special Trial Judge shall be presumed to be correct.

Explanation

Introduction

In Ballard v. Commissioner, supra, the Supreme Court reversed the judgments of the Courts of Appeals for the Seventh and Eleventh Circuits in Estate of Kanter v. Commissioner, 337 F.3d 833 (7th Cir. 2003), and Ballard v. Commissioner, 321 F.3d 1037 (11th Cir. 2003), and held that the Tax Court may not exclude from the record on appeal the initial report of the special trial judge submitted to the Chief Judge under Rule 183(b).

In its opinion, the Supreme Court traced the history of Rule 183. The Supreme Court noted, with apparent approval, that the predecessor of Rule 183, former Rule 182, had established a transparent process whereby a special trial judge's report was served on the parties, and the parties then had an opportunity to file objections before a Presidentially appointed Tax Court judge

considered the report and any objections thereto and issued the opinion of the Court. Under former Rule 182, the initial report of the special trial judge was included in the record on appeal.

The Supreme Court concluded that the collaborative process used to review the special trial judge's initial report in the cases before it was not prescribed in Rule 183 and did not comply with the provisions of Rule 183. Because the process used was not described in Rule 183 and the resulting opinion did not permit an appellate court to adequately review the Tax Court's review process for compliance with Rule 183, the Supreme Court reversed the judgments of the Courts of Appeals for the Seventh and Eleventh Circuits and remanded the cases "for further proceedings consistent with this opinion." Ballard v. Commissioner, 544 U.S. __, __, 125 S.Ct. 1270, 1285 (2005).

History of Rule 183

Before 1983, former Rule 182 set forth the posttrial procedures for cases assigned to a special trial judge, formerly called a commissioner, in which the special trial judge was not authorized to make a decision. The salient features of former Rule 182 were as follows:

1. The special trial judge would "file" a report, including findings of fact and opinion, and a copy of that report would be served on the parties.

2. The parties could "file" any exceptions of law or fact to the report.

3. The Presidentially appointed judge to whom the case was assigned could:

(a) Adopt the report;

(b) modify or reject the report in whole or in part;

(c) receive further evidence; or

(d) recommit the report with instructions.

4. In performing the above functions, the Presidentially appointed judge was required to give "due regard" to the fact that the special trial judge had the opportunity to evaluate the credibility of witnesses and the special trial judge's findings of fact were "presumed" to be correct.

The rule governing cases tried before a special trial judge in which the special trial judge was not authorized to make the decision was changed in 1983 with the promulgation of Rule 183. The most significant pre-1983 provision that was incorporated into Rule 183 was the provision that the special trial judge had the opportunity to evaluate the credibility of the witnesses, and the findings of fact recommended by the special trial judge "shall be presumed to be correct." Rule 183(c). The Supreme Court in Ballard held that the correct application of Rule 183(c) could not be adequately reviewed on appeal without disclosure of the special trial judge's initial report.

The predecessor to Rule 183(c), former Rule 182(d), was adopted in 1973 and was modeled on Rule 147(b) of the former United States Court of Claims. 60 T.C. 1150 (Tax Court review procedures were to be "comparable" to those used in the Court of Claims). The Supreme Court in Ballard described the evolution of Rule 183(c) as follows:

> Under Rule 182 as it was formulated in 1973, the Tax Court's review of the special trial judge's report was a transparent process. Rule 182(b) provided for service of copies of the special trial judge's report on the parties and Rule 182(c) allowed parties to file exceptions to the report. 60 T.C., at 1149. The process resembled a district court's review of a magistrate judge's report and recommendation: The regular Tax Court judge reviewed the special trial judge's report independently, on the basis of the record and the parties' objection to the report. See Rule 182(c), (d), id., at 1149-1150. In years before 1984, the Tax Court acknowledged instances in which it "disagree[d] with the Special Trial Judge," see Rosenbaum v. Commissioner, 45 TCM 825, 827 (1983), * * * or modified the special trial judge's findings, see Taylor v. Commissioner, 41 TCM 539 (1980) * * * (adopting special trial judge's report with "some modifications"). Parties were therefore equipped to argue to an appellate court that the Tax Court failed to give the special trial judge's findings the measure of respect required by Rule 182(d)'s "[d]ue regard" and "presumed to be correct" formulations. [Ballard v. Commissioner, 544 U.S. __, __, 125 S.Ct. 1270, 1280 (2005).]

Summary of Statutory Provisions and Rules Governing Jurisdiction of U.S. Magistrate Judges

In describing the procedures established under former Rule 182(b) and (c), the Supreme Court in Ballard noted the similarity of the Tax Court's review procedure to that used by a district court in reviewing a magistrate judge's report and recommendation. Id. The Supreme Court observed that the "initial findings or recommendations of magistrate judges, special masters, and bankruptcy judges are available to the appellate court authorized to review the operative decision of the district court." Ballard v. Commissioner, 544 U.S. __, __, 125 S.Ct. 1270, 1285 (2005).

Like the special trial judges, magistrate judges are authorized by statute to hear various types of cases and matters. A magistrate judge's nonconsensual jurisdiction over cases in which the magistrate judge is not authorized to make a decision is analogous to the jurisdiction over cases assigned to a special trial judge by the Chief Judge in which the special trial judge is not authorized to make the decision of the Tax Court, although there are important statutory differences.

Section 636(b)(1)(B) of title 28 authorizes a judge of the court to designate a magistrate judge to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of certain specified matters. The magistrate judge must "file" a proposed findings and recommendations (report), and a copy must be mailed to all parties. Within 10 days after being served with a copy of the magistrate judge's report, any party may serve and file written objections to the report "as provided by rules of court." 28 U.S.C. sec. 636(b)(1) (2000); see Fed. R. Civ. P. 72(b).

The actions that a judge of the court may take regarding the magistrate judge's report are as follows:

> A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions. [28 U.S.C. sec. 636(b)(1) (2000).]

Proposed Amendments to Rules 182 and 183

The Tax Court proposes to amend its Rule 183 to provide substantially the same procedure as that set forth in former Rule 182, including:

1. The preparation of the recommended findings of fact and conclusions of law of the special trial judge;

2. The filing of the recommendations;

3. Service of the recommendations on the parties;

4. A reasonable opportunity for the parties to file exceptions to the recommendations before the case is reassigned to a Presidentially appointed judge for action on the recommendations; and

5. Action on the recommendations by the assigned Presidentially appointed judge in accordance with Rule 183 as amended. The standard for reviewing a special trial judge's recommendations remains unchanged.

The Tax Court proposes to amend its Rule 182 to add new paragraph (e), which provides that, in a case assigned to a special trial judge pursuant to section 7443A(b)(1), (3), or (4), once the Chief Judge decides to assign the case to a Presidentially appointed judge to prepare the opinion and make the decision in the case, the procedures set forth in proposed Rule 183 will apply; i.e., the report will be served on the parties, exceptions may be filed by the parties, and the case will be reassigned to a Presidentially appointed judge for issuance of an opinion and entry of decision.

III. Rules Regarding Admission To Practice Before the Tax Court and Disciplinary Action

Rules 200 and 202 are deleted and replaced with the following.

Proposed RULE 200. ADMISSION TO PRACTICE AND PERIODIC REGISTRATION FEES

(a) Qualifications: (1) *General:* An applicant for admission to practice before the Court must establish to the satisfaction of the Court that the applicant is of good moral and professional character

and possesses the requisite qualifications to provide competent representation before the Court. In addition, the applicant must satisfy the other requirements of this Rule. If the applicant fails to satisfy the requirements of this Rule, then the Court may deny such applicant admission to practice before the Court.

(2) *Attorney Applicants:* An applicant who is an attorney at law must, as a condition of being admitted to practice, file with the Admissions Clerk at the address listed in Rule 200(b) a completed application accompanied by a fee to be established by the Court, see Appendix II, and a current certificate from the Clerk of the appropriate court, showing that the applicant has been admitted to practice before and is a member in good standing of the Bar of the Supreme Court of the United States, or of the highest or appropriate court of any State or of the District of Columbia, or any commonwealth, territory, or possession of the United States. A current court certificate is one executed within 90 calendar days preceding the date of the filing of the application.

(3) *Nonattorney Applicants:* An applicant who is not an attorney at law must, as a condition of being admitted to practice, file with the Admissions Clerk at the address listed in Rule 200(b), a completed application accompanied by a fee to be established by the Court. See Appendix II. In addition, such an applicant must, as a condition of being admitted to practice, satisfy the Court, by means of a written examination given by the Court, that the applicant possesses the requisite qualifications to provide competent representation before the Court. Written examinations for applicants who are not attorneys at law will be held no less often than every two years. By public announcement at least six months prior to the date of each examination, the Court will announce the date and the time of such examination. The Court will notify each applicant, whose application for admission is in order, of the time and the place at which the applicant is to be present for such examination, and the applicant must present that notice to the examiner as authority for taking such examination.

(b) Applications for Admission: An application

for admission to practice before the Court must be on the form provided by the Court. Application forms and other necessary information will be furnished upon request addressed to the Admissions Clerk, United States Tax Court, 400 Second St., N.W., Washington, D.C. 20217. As to forms of payment for application fees, see Rule 11.

(c) Sponsorship: An applicant for admission by examination must be sponsored by at least two persons theretofore admitted to practice before this Court, and each sponsor must send a letter of recommendation directly to the Admissions Clerk at the address listed in Rule 200(b), where it will be treated as a confidential communication. The sponsor shall send this letter promptly after the applicant has been notified that he or she has passed the written examination required by paragraph (a)(3). The sponsor shall state fully and frankly the extent of the sponsor's acquaintance with the applicant, the sponsor's opinion of the moral character and repute of the applicant, and the sponsor's opinion of the qualifications of the applicant to practice before this Court. The Court may in its discretion accept such an applicant with less than two such sponsors.

(d) Admission: Upon the Court's approval of an application for admission in which an applicant has subscribed to the oath or affirmation and upon an applicant's satisfaction of the other applicable requirements of this Rule, such applicant will be admitted to practice before the Court and be entitled to a certificate of admission.

(e) Change of address: Each person admitted to practice before the Court shall promptly notify the Admissions Clerk at the address listed in Rule 200(b) of any change in office address for mailing purposes. See also Rule 21(b)(4) regarding the filing of a separate notice of change of address for each docket number in which such person has entered an appearance.

(f) Corporations and Firms Not Eligible: Corporations and firms will not be admitted to practice or recognized before the Court.

(g) Periodic Registration Fees: (1) Each person admitted to practice before the Court shall pay a periodic registration fee. The frequency and the amount of such fee shall be determined by the Court, except that such amount shall not exceed $30 per calendar year. The Clerk shall maintain an Ineligible List containing the names of all persons admitted to

practice before the Court who have failed to comply with the provisions of this Rule 200(g)(1). No such person shall be permitted to commence a case in the Court or enter an appearance in a pending case while on the Ineligible List. The name of any person appearing on the Ineligible List shall not be removed from the List until the currently due registration fee has been paid and arrearages have been made current. Each person admitted to practice before the Court, whether or not engaged in private practice, must pay the periodic registration fee. As to forms of payment, see Rule 11.

(2) The fees described in Rule 200(g)(1) shall be used by the Court to compensate independent counsel appointed by the Court to assist it with respect to disciplinary matters. See Rule 202(f).

Proposed RULE 202. DISCIPLINARY MATTERS

(a) General: A member of the Bar of this Court may be disciplined by this Court as a result of:

(1) Conviction in any court of the United States, or of the District of Columbia, or of any state, territory, commonwealth, or possession of the United States of any felony or of any lesser crime involving false swearing, misrepresentation, fraud, criminal violation of any provision of the Internal Revenue Code, bribery, extortion, misappropriation, theft, or moral turpitude;

(2) Imposition of discipline by any other court of whose bar an attorney is a member, or an attorney's disbarment or suspension by consent or resignation from the bar of such court while an investigation into allegations of misconduct is pending;

(3) Conduct with respect to the Court which violates the letter and spirit of the Model Rules of Professional Conduct of the American Bar Association, the Rules of the Court, or orders or other instructions of the Court; or

(4) Any other conduct unbecoming a member of the Bar of the Court.

(b) Disciplinary Actions: Discipline may consist of disbarment, suspension from practice before the Court, reprimand, admonition, or any other sanction that the Court may deem appropriate. The Court may, in the exercise of its discretion, immediately suspend a

practitioner from practice before the Court until further order of the Court. However, no person shall be suspended for more than 60 days or disbarred until such person has been afforded an opportunity to be heard. A Judge of the Court may immediately suspend any person for not more than 60 days for contempt or misconduct during the course of any trial or hearing.

(c) Disciplinary Proceedings: Upon the occurrence or allegation of any event described in Rule 202(a)(1) through (a)(4), except for any suspension imposed for 60 days or less pursuant to Rule 202(b), the Court shall issue to the practitioner an order to show cause why the practitioner should not be disciplined or shall otherwise take appropriate action. The order to show cause shall direct that a written response be filed within such period as the Court may direct and shall set a prompt hearing on the matter before one or more Judges of the Court. If the disciplinary proceeding is predicated upon the complaint of a Judge of the Court, the hearing shall be conducted before a panel of three other Judges of the Court.

(d) Reinstatement: (1) A practitioner suspended for 60 days or less pursuant to Rule 202(b) shall be automatically reinstated at the end of the period of suspension.

(2) A practitioner suspended for more than 60 days or disbarred pursuant to Rule 202 may not resume practice before the Court until reinstated by order of the Court.

(A) A disbarred practitioner or a practitioner suspended for more than 60 days who wishes to be reinstated to practice before the Court must file a petition for reinstatement. Upon receipt of the petition for reinstatement, the Court may set the matter for prompt hearing before one or more Judges of the Court. If the disbarment or suspension for more than 60 days was predicated upon the complaint of a Judge of the Court, any such hearing shall be conducted before a panel of three other Judges of the Court.

(B) In order to be reinstated before the Court, the practitioner must demonstrate by clear and convincing evidence in the petition for reinstatement and at any hearing that such practitioner’s reinstatement will

not be detrimental to the integrity and standing of the Court's Bar or to the administration of justice, or subversive of the public interest.

(C) No petition for reinstatement under this Rule shall be filed within 1 year following an adverse decision upon a petition for reinstatement filed by or on behalf of the same person.

(e) Right to Counsel: In all proceedings conducted under the provisions of this Rule, the practitioner shall have the right to be represented by counsel.

(f) Appointment of Court Counsel: The Court, in its discretion, may appoint counsel to the Court to assist it with respect to any disciplinary and related matters.

(g) Jurisdiction: Nothing contained in this Rule shall be construed to deny to the Court such powers as are necessary for the Court to maintain control over proceedings conducted before it, such as proceedings for contempt under Code Section 7456 or for costs under Code Section 6673(a)(2).

Explanation

The Tax Court proposes to eliminate the requirement in Rule 202(d) that counsel appointed by the Court to assist in the investigation or prosecution of disciplinary allegations or in conjunction with reinstatement proceedings of a practitioner shall be a resident of or practice in the same Federal judicial circuit as the practitioner. The current Rule presents a practical problem for the Court in terms of locating counsel in the same judicial circuit as the practitioner facing disciplinary action. The other proposed amendments provide primarily reorganization of the Rules and removal of archaic language.