

Pursuant to Tax Court Rule 50(f), orders shall not be treated as precedent, except as otherwise provided.

UNITED STATES TAX COURT  
WASHINGTON, DC 20217

|                                   |   |                     |
|-----------------------------------|---|---------------------|
| MEDTRONIC, INC. & CONSOLIDATED    | ) | <b>SD</b>           |
| SUBSIDIARIES,                     | ) |                     |
|                                   | ) |                     |
| Petitioner(s),                    | ) |                     |
|                                   | ) |                     |
| v.                                | ) | Docket No. 6944-11. |
|                                   | ) |                     |
| COMMISSIONER OF INTERNAL REVENUE, | ) |                     |
|                                   | ) |                     |
| Respondent                        | ) |                     |

**ORDER**

On January 5, 2015, petitioner filed a motion for protective order. Pursuant to Rule 103(a)<sup>1</sup>, petitioner requests that the Court enter a protective order to protect from disclosure during the trial and post-trial briefing its proprietary and confidential information. On January 20, 2015, respondent filed a notice of objection to petitioner's motion.

On April 8, 2014, this Court granted petitioner's unopposed motion for protective order (filed April 4, 2014). The Court's Order applied to discovery and pretrial proceedings only.

The Motion for Protective Order is accompanied by an affidavit by Gary L. Ellis, Executive Vice President and Chief Financial Officer of petitioner. This affidavit contends that petitioner has made a significant effort to ensure that all of petitioner's officers, employees, contractors, and agents guard confidentiality of proprietary information. The affidavit further contends that petitioner will sustain irreparable economic harm from proprietary information being divulged. Petitioner contends the release of proprietary information would allow competitors to determine petitioner's current business strategies, strengths, and weaknesses in the market.

Section 7458 of the Internal Revenue Code provides that "[h]earings before the Tax Court and its divisions shall be open to the public." Section 7461(a) similarly provides that "all evidence received by the Tax Court and its divisions, including a transcript of the stenographic report of the hearings, shall be public records open to the inspection of the public." An exception to these general rules is set forth in section 7461(b)(1), which provides that the Court "may make any provision which is necessary to prevent the disclosure of trade secrets or other confidential information, including a provision that any document or information be placed under seal to be opened only as directed by the court."

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<sup>1</sup>All Rule references are to the Tax Court Rules of Practice and Procedure.

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Rule 103(a) implements these statutory provisions. It provides that, upon motion supported by good cause, "the Court may make any order which justice requires" to ensure that "a trade secret or other information not be disclosed or be disclosed only in a designated way." Rule 103(a)(7). Such an order may include direction that the parties file specified documents or information enclosed in sealed envelopes and that written materials, after being sealed, be opened only by order of the Court. Rule 103(a)(6) & (8). Rule 103(a) resembles Rule 26(c)(1) of the Federal Rules of Civil Procedure, and this Court generally follows decisions interpreting that Rule when considering requests for protective orders. See Willie Nelson Music Co. v. Commissioner, 85 T.C. 914, 916-917 (1985). A protective order is appropriate where the material is the type of information that courts will protect and the requesting party shows good cause for protecting it. Publiker Indus., Inc. v. Cohen, 733 F.2d 1059, 1071 (3rd Cir. 1984); Estate of Murphy v. Commissioner, T.C. Memo. 1990-346, 60 T.C.M. (CCH) 73,75.

Petitioner's motion for protective order does not request that the Court seal the entire trial record. Rather, the motion requests that specific documents or portions of documents, and specific testimony or portions of testimony be sealed only to the extent necessary to prevent disclosure of confidential information.

Petitioner has established by affidavit the common-sense proposition that disclosure of its proprietary information would result in economic harm to petitioner. Petitioner has thus met its burden of showing "good cause" under Rule 103(a). On numerous prior occasions, this Court has issued protective orders to ensure the confidentiality of proprietary business information and intellectual property that has been the subject of section 482 transfer pricing disputes. See, e.g., Veritas Software Corp. & Subs. v. Commissioner, 133 T.C. 297, docket No. 12075-06 (2009) (entire record sealed); GlaxoSmithKline Holdings (Americas) Inc. & Subs. v. Commissioner, T.C. docket No. 5750-04 (trade secrets sealed); DHL Corp. & Subs. v. Commissioner, T.C. Memo. 1998-461, docket No. 19570-95 (entire record sealed); Seagate Tech. Inc. v. Commissioner, 102 T.C. 149, docket No. 11660-90 (1994) (trade secrets sealed). It is the goal of this Court to provide as robust a public record as possible while protecting petitioner's proprietary information. We are satisfied that the terms of the protective order set forth below will enable the largest possible percentage of the trial record to be made available for ultimate public inspection, consistently with the protection of petitioner's proprietary information. In light of the foregoing, it is hereby

ORDERED that petitioner's Motion for Protective Order, filed January 5, 2015, is granted in that the following terms and conditions shall govern the treatment of Proprietary Information during the Special Trial Session of this Court scheduled for February 2, 2015, in Chicago, Illinois and during post-trial proceedings:

1. For purposes of this Order (Trial Protective Order), "Proprietary Information" is defined to include the following information, all of which shall constitute Protected Information under this Trial Protective Order:

a. Proprietary and confidential documents and other commercial information relating to petitioner's business operations that contain trade secrets or other confidential commercial information for which there is good cause for protection for such information

and that are not in the public domain or otherwise available to third parties. Proprietary Information shall include documents and information in four primary categories: (1) medical device design and manufacturing information, including the technical details that ensures that petitioner's products are manufactured according to petitioner's quality standards; (2) confidential financial information that, among other things, shows sales, revenues, profits, calculations of product liability by product and by business, plans and projections, budgets, revenue estimates, cost/expense estimates, and sales estimates; (3) confidential strategic information still relevant for business purposes that reflects petitioner's overall plans for achieving and maintaining its share of the medical device market in the United States and worldwide; and (4) non-public contractual terms.

b. Any additional confidential information agreed by the parties or, absent agreement, determined by the Court to constitute Proprietary Information.

2. Proprietary Information does not include information that is already lawfully in the public domain, or that is made publicly available by, or with the consent of, the designating party.

3. Proprietary Information designated as protected information by a party pursuant to the terms of this Court's Order Regarding Protected Information dated April 8, 2014 (Pretrial Protective Order), shall be Protected Information for purposes of this Trial Protective Order. However, Proprietary Information in the trial record of this case shall be subject to seal or redaction as Protected Information as set forth in paragraphs 7, 8, and 9 of this Trial Protective Order.

4. For purposes of this Trial Protective Order, reproductions of, extracts of, and summaries of Protected Information shall be Protected Information to the same extent as the Protected Information to which such reproductions, extracts, or summaries relate.

5. Information originally designated as Protected Information shall not retain that status after any Order of this Court denying it such status.

6. All provisions of the Pretrial Protective Order governing disclosure of Protected Information other than as evidence at trial shall continue in effect.

7. Trial Evidence - Expert Witness Testimony.

a. On or before Wednesday, January 28, 2015, petitioner shall submit to respondent a version of the parties' expert witness reports and deposition transcripts showing petitioner's proposed redactions of Protected Information and separate versions with the redacted information removed.

b. At any subsequent date that is mutually agreed, or otherwise established by the Court, respondent may challenge petitioner's confidentiality designations and seek the inclusion of additional information in the version of the report or deposition transcript for inclusion in the public record of the trial.

c. When the final redactions have been determined by the parties or the Court, the expert witness reports (or deposition testimony) as finally redacted shall be provided to the Court, and such redacted versions shall replace any prior redacted version of such report or deposition in the publicly available trial record.

d. The parties will coordinate with the Court regarding the most efficient method of protecting the confidentiality of the Protected Information during the examination or cross examination of experts, including the use of redacted portions of expert depositions.

e. In the event that the courtroom is closed during expert witness testimony to persons other than those affiliated with the Court or on the parties' courtroom inclusion lists (as set forth in paragraph 8(a), below), on or before the Monday following each week during which expert witness testimony is taken, petitioner shall submit to respondent and the Court a version of the transcript of such expert testimony that is redacted to exclude Protected Information.

f. Respondent may challenge petitioner's redactions under paragraph 7(e), at any time after receipt of each redacted transcript, with an appropriate filing with the Court. Any redacted information thereafter deemed non-confidential by the Court, after hearing arguments of the parties, shall become part of the publicly available record of the trial. If respondent does not challenge petitioner's redactions by a date to be established by the Court, petitioner's version of the redacted transcript shall become part of the publicly available record of the trial.

#### 8. Trial Evidence - Fact Testimony.

a. Current employees of respondent and petitioner shall have unrestricted access to the courtroom during trial sessions, except to the extent excluded under Tax Court Rule 145. Respondent and petitioner shall each transmit to the Court a list of attorneys, legal assistants, expert witnesses and support staff, and fact witnesses not otherwise excluded (and, if applicable, their separate attorneys) who shall have access to the courtroom during trial sessions. This list shall be transmitted to the Court by January 28, 2015.

b. Attorneys (other than petitioner's and respondent's counsel) for fact witnesses shall only be permitted in the courtroom for the portion of the trial during which their client is providing testimony.

c. Persons not on the parties' lists (or persons not otherwise affiliated with the Court) shall not be permitted in the courtroom during fact testimony at trial unless otherwise directed by the Court. Petitioner shall have the primary responsibility to assure compliance with this paragraph.

d. On or before the Monday following each week of fact testimony, petitioner shall submit to respondent and the Court a version of the prior week's transcript excluding testimony redacted as Protected Information.

e. Respondent may challenge petitioner's redactions under paragraph 8(d), at any time after receipt of each redacted transcript, with an appropriate filing with the Court. Any redacted information thereafter deemed non-confidential by the Court, after hearing arguments of the parties, shall become part of the publicly available record of the trial. If respondent does not challenge petitioner's redactions by a date to be established by the Court, petitioner's version of the redacted transcript shall become part of the publicly available record of the trial.

9. Trial Evidence - Exhibits. On or before January 27, 2015, petitioner shall notify respondent and the Court of any stipulated exhibits or party exhibits listed in the exhibit lists exchanged on January 16, 2015, that are required to be placed under seal because they contain Protected Information. Respondent may challenge petitioner's designations at any time after such notification with an appropriate filing with the Court. Sealed exhibits shall be physically segregated from other trial exhibits and identified in a manner that distinguishes them from those other exhibits. Sealed exhibits shall remain under seal unless thereafter the Court requires them to be unsealed or made available with appropriate redactions, after hearing arguments of the parties.

10. Sharing of Protected Information. Without prior leave of the Court, neither party may share Protected Information (including unredacted trial transcripts, unredacted expert witness reports, and sealed exhibits) with any persons not included on the parties' lists in paragraph 8(a), except that current employees of respondent and petitioner shall have unrestricted access to Protected Information.

11. Pretrial, Trial, and Post-trial Filings. Material previously designated as Protected Information may be included in, or attached to, filings with the Court before, during or after trial, but only in accordance with this Order. The Court will consider at the close of the trial appropriate procedures to provide for the continued protection of Protected Information in the post-trial briefing process.

12. To the extent respondent challenges petitioner's redactions under any provision of this Order, unless otherwise ordered by the Court, the burden rests on petitioner to establish that the information is Confidential Information and to demonstrate that protection is warranted. Information designated as Protected Information will be treated as such during the resolution of the dispute.

13. Nothing in this Trial Protective Order, or anything done in compliance with this Trial Protective Order, constitutes a waiver by either party of the confidentiality of any information or document subject hereto.

14. Within 90 days after the final termination of this action pursuant to I.R.C. § 7481, all documents designated as Protected Information, including extracts or summaries thereof, and all reproductions thereof, shall be returned to the disclosing party or shall be destroyed, with the following exceptions: copies of papers submitted to the Court (including exhibits); the unredacted portions of deposition, hearing, or trial transcripts; and one copy of documents and things produced by the parties or non-parties in this case, which may be retained by trial counsel. If materials are destroyed, trial counsel shall, within 120 days after the final termination of this action, as defined in I.R.C. § 7481, certify to opposing trial counsel that destruction has taken place. However, trial counsel may retain email and other electronically stored information in a manner consistent with this Trial Protective Order and Court's April 8, 2014, Order, for the making or retention of copies necessary for tax administrative purposes including for examination or litigation without leave of the Court.

15. Unless otherwise ordered by the Court, Protected Information shall remain under seal and shall not become part of the record of this case available to the public.

16. Except as specifically provided herein, the terms, conditions, and limitations of this Trial Protective Order shall survive the termination of this action. The Court retains jurisdiction over the parties and other persons governed by this Trial Protective Order for purposes of modifying this Trial Protective Order or adjudicating any dispute regarding the improper use or disclosure of Protected Information disclosed under the protections of this Trial Protective Order.

17. Nothing herein shall preclude the parties from bringing a proceeding in another administrative or judicial forum seeking redress for the unwarranted disclosure of Protected Information, or deprive such administrative or judicial forum of jurisdiction over such proceeding.

**(Signed) Kathleen Kerrigan  
Judge**

Dated: Washington, D.C.  
January 22, 2015