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November 10, 2015

The Honorable Michael B. Thornton
Chief Judge
United States Tax Court
400 Second Street, NW
Washington, DC 20217

Re: Comments on Tax Court Rules of Practice and Procedure

Dear Chief Judge Thornton:

Enclosed please find comments on changes to the Tax Court's Rules of Practice and Procedure ("Comments"). These Comments are submitted on behalf of the American Bar Association Section of Taxation and have not been approved by the House of Delegates or the Board of Governors of the American Bar Association. Accordingly, they should not be construed as representing the position of the American Bar Association.

The Section of Taxation would be pleased to discuss the Comments with you or your staff if that would be helpful.

Sincerely,

George C. Howell, III
Chair, Section of Taxation

Enclosure

cc: William J. Wilkins, Chief Counsel, Internal Revenue Service

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**AMERICAN BAR ASSOCIATION
SECTION OF TAXATION**

**COMMENTS ON CHANGES TO THE TAX COURT'S RULES OF
PRACTICE AND PROCEDURE**

These comments (the “Comments”) are submitted on behalf of the American Bar Association Section of Taxation (the “Section”) and have not been approved by the House of Delegates or Board of Governors of the American Bar Association. Accordingly, they should not be construed as representing the position of the American Bar Association.

Principal responsibility for preparing these Comments was exercised by the Section’s Committee on Court Procedure and Practice (“CPP”) Chair, Juan F. Vasquez, Jr., and Vice Chairs, Joshua D. Odintz and Alexandra Minkovich; and the Section’s Committee on Pro Bono and Tax Clinics Chair, Andrew Roberson, and Vice Chair, Christine Speidel. Substantive contributions were made by Erica Brady, Elizabeth Blickley, Jeremiah Coder, Mitchell Horowitz, Derek Kaczmarek, Richard Sapinski, Scott Schumacher, and Andrew VanSingel. The Comments were reviewed by Mary A. McNulty, the Section’s Council Director for CPP and a member of the Section’s Committee on Government Submissions; and Peter Blessing, the Section’s Vice Chair (Government Relations).

Although the members of the Section who participated in preparing these Comments have clients who might be affected by the federal tax principles addressed by these Comments, no such member or the firm or organization to which such member belongs has been engaged by a client to make a government submission with respect to, or otherwise to influence the development or outcome of, the specific subject matter of these Comments. Additionally, while the Section’s diverse membership includes government officials, no such officials were involved in any part of the drafting or review of these Comments.

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Date: November 10, 2015

EXECUTIVE SUMMARY

On September 11, 2015, the Office of Chief Counsel of the Internal Revenue Service (the “Service”) submitted a letter to the Honorable Michael B. Thornton, Chief Judge of the United States Tax Court, suggesting changes to the Tax Court’s Rules of Practice and Procedure. As part of the Tax Court’s ongoing efforts to improve and modernize its rules and procedures, Chief Judge Thornton subsequently invited practitioners and the interested public to submit for consideration any comments, concerns and proposals regarding the Tax Court’s Rules. These comments are submitted in response to that invitation. They first provide the Section’s views on the changes proposed by the Chief Counsel and then make additional proposals to improve practice before the Tax Court. The Section applauds the Chief Counsel for beginning the dialog as to how practice before the Tax Court could be improved and for the thoughtful comments reflected in his September 11th submission. The Section appreciates the opportunity to provide comments on how to improve practice before the Tax Court and specifically a chance to respond to the Chief Counsel’s suggestions.

The Section’s comments can be summarized as:

- a. Answers in Small Tax Cases: The Section does not support a change in the Rules that would permit the Service to file a general denial in small tax cases. The Section instead suggests that the Service include a cover letter with its response, which provides contact information for the person responsible for the case and the timeframe in which the taxpayer can expect to be contacted by the Service.
- b. Electronic Filing Requirements: The Section commends the Tax Court’s movement towards e-filing and electronic case management; however, the Section asks that the Tax Court first study whether the new procedures provide sufficient safeguards.
- c. Subpoenas: The Section suggests amending Rule 147 to more closely track Rule 45 of the Federal Rules of Civil Procedure. The amended Rule 147 could provide that subpoenas *duces tecum* issued to third parties be returnable prior to the call of a calendar and can be done by mail or, at a place within 100 miles of where the [subpoenaed] person resides, is employed, or regularly transacts business in person.
- d. Redaction of identifying data in signature blocks of decision documents: The Section supports the Chief Counsel recommendation that the signature requirement in Rule 23(a)(3) be modified to provide either that decision documents no longer must contain petitioner’s address and phone number, or require that such information be redacted.
- e. Imperfect Petitions: The Section respectfully disagrees with the Chief Counsel’s suggestion that petitions be dismissed unless the taxpayer cures an imperfect petition by filing a complete copy of the notice of deficiency or notice of determination. The Section also does not object to the Chief Counsel’s request (a) that respondent not be required to answer or otherwise respond to the petition until this jurisdictional issue has been resolved, (b) that the Court set a new answer date upon satisfaction of its order, and (c) that Rule 25(c) be modified to allow respondent

to file a timely answer in circumstances involving an order for an amendment, supplement, or ratification of the petition.

f. Whistleblower Redactions: The Section agrees with the Chief Counsel’s suggestion for how to redact documents for exhibits that are attached to filings. The Section recommends the use of standard identifiers for use in documents that are drafted or created to be filed with the Court.

g. Inadvertent Disclosure of Privileged Material: The Section agrees with the Chief Counsel’s recommendation that the Court promulgate a rule, analogous to those provided in FRCP 26(b)(5)(B) and FRCP 502(b).

h. Administrative Record in Declaratory Judgment Cases: the Section agrees with changing the date when the stipulated administrative record must be filed under Rule 217, the Section believes that the time to submit the administrative record should be earlier in the litigation process than 45 days prior to trial. The Section suggests that the time to file the fully stipulated administrative record be based on when the case is calendared, possibly either 30 or 60 days after the case is calendared.

i. Permissive Intervention: The Section disagrees that intervention as a matter of right is “inappropriate” in the Tax Court in all cases, and notes that both the Code and the Court have identified certain circumstances—such as innocent spouse cases—in which intervention as a matter of right is entirely appropriate and, in fact, available.

j. Deposition of Party Witness: The Section strongly opposes the Chief Counsel’s suggestion to amend Rule 74 to allow nonconsensual depositions of party witnesses without requiring leave of the Court.

k. Relief from Final Decision: The Section is sympathetic to the need for a mechanism to correct mistakes and inadvertent errors, but, rather than adopt a new rule, we propose that the Court consider revising Rule 162 to allow motions on the basis of mutual mistake, similar to FRCP 60(b)(1). In addition, we agree with the Chief Counsel that the 30-day period to file a motion under Rule 162 may not be sufficient to allow parties to discover errors and move for revision; therefore, we suggest that the Court consider expanding the allowable time period to 90 days.

l. Calendars: The Section opposes this proposed change because it would further delay the resolution of many cases before the Court, especially for taxpayers in locations that the Court visits less frequently.

m. Additional Proposals for Rule Changes:

i. Notification of Electronic Service: The Section suggests that the Court include the name of the case and the name of the document being served in the email that is automatically generated to alert a practitioner to a new document that has been filed.

ii. Changes to Rule 91(f): The Section suggests a change to Rule 91(f) to ensure that Rule 91(f) motions are being used for the intended purpose and not to force stipulations under threat of filing a motion for sanctions.

iii. Status Conferences: The Section recommends that the Court's rules provide for a mandatory telephone status conference no less than 45 days prior to trial in cases with unrepresented taxpayers. The Section also recommends that a stuffer notice be sent with the notice of status conference.

iv. Petition Kit: The Section recommends adding a hyperlink to the Application for Waiver of Filing Fee in the petition kit, and that the Court considers adding a link to a simple explanation of the Tax Court process.

v. Service of Documents: In cases in which the address of one party is being kept confidential, the Section recommends that Rule 21 be amended to provide that the Court will effect service on that party.

vi. Evening Session: The Section recommends that the Court consider holding evening hours once per trial session, exercising its discretion as to which taxpayers qualify for evening hours.

vii. Tax Court Waiver Fee Denial: The Section proposes that if an application for waiver of the filing fee is denied, the denial notice contain instructions for how the taxpayer can request reconsideration.

viii. Request for Place of Trial: The Section disagrees with the proposal by a commenter that Rule 140 be amended to require every taxpayer to justify the requested place of trial.

DISCUSSION

I. Response to Chief Counsel Proposals.

a. Answers in Small Tax Cases.

The Chief Counsel proposes several changes to Rule 173¹ regarding answers in small tax cases on the ground that *pro se* taxpayers often misunderstand formal answers. The Chief Counsel believes that a simplified answer would be more helpful to *pro se* taxpayers. The Chief Counsel proposes that Rule 173 be modified to allow respondent to file a modified answer that consists of: (1) a general denial of the allegations in the petition; (2) contact information of the Chief Counsel attorney responsible for the case; and (3) the time frame within which the petitioner will be contacted by an Appeals or Settlement Officer.

We appreciate and share the Chief Counsel's goal of improving procedures to facilitate participation by *pro se* taxpayers and to minimize the confusion that often results when *pro se* taxpayers interpret denials in the answer to mean they have lost the case. However, we are concerned that the proposed changes would disadvantage petitioners electing to proceed under the small tax case procedures. The Section instead makes the following two recommendations. First, as explained more fully below, the Section recommends that the Rules encourage Chief Counsel to review the administrative file and prepare a detailed answer in small tax cases, rather than permit a general denial. Second, the Section suggests that the Court's acknowledgment of receipt in small tax cases should include an additional notice that (a) provides a short explanation of the judicial process; and (b) explains that the answer represents the Service's view of the case, and not the views of the Tax Court, which will decide the case based on the upcoming trial. We believe that these proposals fully address the concerns raised by the Chief Counsel and that Rule 173 should remain unchanged because it protects *pro se* and unsophisticated taxpayers.

As stated in Rule 36, the purpose of the answer is to "advise the petitioner and the Court fully of the nature of the defense." Rule 173 addressing pleadings in small tax cases does not limit this requirement. An answer that fully complies with Rule 36 and reflects the facts and documents in the administrative file would be helpful to many taxpayers. For example, if respondent's counsel reviewed the administrative file before filing an answer in a substantiation case with a *pro se* taxpayer, respondent's counsel could note in the answer that the taxpayer has not provided the required documentation to support X or Y expense. This would encourage *pro se* litigants to focus on locating the relevant documentation to support the portion of their case that is in dispute. Too often, *pro se* litigants do not understand what documents are required to prove their case until they are at the calendar call. Allowing the Service to issue a general denial to allegations in the petition would defeat the purpose of narrowing the issues at the earliest stages of litigation and could further delay the process.

¹ References to a "Rule" are to the United States Tax Court Rules of Practice and Procedure, as amended, unless otherwise indicated.

Current Rules 36 and 173 effectively require a Chief Counsel attorney to review the taxpayer's file in order to file an answer, before referring the case to the Office of Appeals if it qualifies for Appeals consideration. This review has two important benefits. First, the Chief Counsel attorney can identify jurisdictional defects in the petition and file the appropriate motion with the Court to resolve such threshold issues. This saves time and resources on both sides of the case. Second, some cases are conceded by Chief Counsel before they are sent to Appeals for either legal or factual reasons. For example, following the Tax Court's opinion in *Rand v. Commissioner*,² the Service announced that it would no longer assert the accuracy-related penalty under the facts of that case. Similarly, the Service may concede a petition with factual allegations supported by documents in the administrative file. And sometimes, a taxpayer receives a no-change letter from the Service shortly after filing the petition. *Pro se* and unsophisticated taxpayers become confused when trying to reconcile what they have been told by a customer service representative of the Service or in a no-change letter with the blanket denials in the answer filed by the Service. Therefore, the Section recommends that the Rules encourage the Chief Counsel attorney to review the administrative file and prepare a detailed answer in small tax cases, rather than permit a general denial.

The Section also recommends that the Office of Chief Counsel include a form cover letter with the answer, containing the contact information for the Chief Counsel attorney assigned to the case and any available information regarding an upcoming Appeals referral. The Section agrees that it is helpful for taxpayers to have a contact person at the Chief Counsel's office and that it is also helpful to tell taxpayers more about the process, including the timeframe in which they can expect to be contacted by an Appeals or Settlement Officer. A form cover letter is a more appropriate way to communicate this information than in the answer itself.

The Section believes that these changes would result in less taxpayer confusion and a more efficient process, while still ensuring that jurisdictional issues continue to be litigated promptly and that cases are resolved as promptly as possible. Any unnecessary delay in resolving a case may impose a significant hardship on the taxpayer.

Finally, the Section is concerned that the Service's proposal may negatively impact other Rules. For example, section 7430³ provides for an award of reasonable administrative and litigation costs to a taxpayer in an administrative or court proceeding brought against the United States involving the determination of any tax, interest, or penalty pursuant to the Internal Revenue Code.⁴ An award of costs may be made when the taxpayer meets certain requirements, including that the taxpayer is the "prevailing party."⁵ One requirement to be a prevailing party is to show that the Service's position was "not substantially justified."⁶ This standard is applied as of the separate dates the Service took positions in the administrative and judicial proceedings.⁷ The Service's position in the judicial proceeding is initially taken on the date the Service files the

² 141 T.C. 376 (2013).

³ References to a "section" are to a section of the Internal Revenue Code of 1986, as amended (the "Code"), unless otherwise indicated.

⁴ See generally Rules 230 – 233.

⁵ Rule 232(e); I.R.C. § 7430(a).

⁶ I.R.C. § 7430(c)(4)(A); 28 U.S.C. § 2412(d)(1)(B); Treas. Reg. § 301.7430-5(a)(1).

⁷ Reg. § 301.7430-5(c); I.R.C. § 7430(c)(4)(B).

answer in response to the petition.⁸ Allowing a general denial of the allegations in the petition would result in neither the taxpayer nor the Court knowing the Service's initial position, which may make it more difficult for taxpayers to be awarded litigation costs.⁹

The Section has no objection to the electronic filing of answers, with a copy served on the taxpayer as currently required by Rule 21.

b. Electronic Filing Requirements.

The Chief Counsel suggests several changes to Rule 26 relating to electronic filing of documents. The Section commends the Tax Court's movement towards e-filing and electronic case management; however, the Section asks that the Tax Court first study whether the system includes sufficient safeguards to ensure the security of documents that are e-filed under seal. In addition, if the Rules are revised to allow electronic signatures on closing documents, the system should properly ensure the authenticity of such electronic signatures.

The Chief Counsel's first suggestion is to require that all documents filed by parties represented by counsel be e-filed. The Section has no objection to this proposal, except when the documents are filed under seal, as discussed more fully below.

The Chief Counsel's second suggestion is to change Rule 155 to allow the parties to secure electronic or handwritten signatures for electronic submission of decision documents. The Section agrees with this suggestion, so long as there are adequate safeguards in place to ensure that electronically submitted signatures can be validated.

The Chief Counsel's third suggestion is to make cases that are under seal viewable through eAccess, or similar future electronic filing system. The Section has concerns related to the security of cases or documents within cases that are under seal being available through eAccess. In general, documents and exhibits filed with the Tax Court are public records open to inspection of the public.¹⁰ However, subsection (b) of section 7461 provides an exception for trade secrets and other confidential information. As noted in the Chief Counsel's letter, "[i]n 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." For cases that are proceeding under seal, the parties are unable to access documents that have been filed or view the on-line docket sheet. The Section agrees that the ability to view documents through eAccess, as well as the e-filing of documents under seal, would be easier for practitioners. However, the Section is concerned that such documents would inadvertently become available to the public and not remain under seal.¹¹ For example, in a whistleblower action, the whistleblower who is seeking review of a determination by

⁸ I.R.C. § 7430(c)(7)(A); *Maggie Management Co. v. Commissioner*, 108 T.C. 430, 442 (1997).

⁹ If the Court were to adopt the Chief Counsel's proposal regarding general denials in a small tax case, then arguably taxpayers who later make a claim for litigation costs could be deemed to satisfy the 'not substantially justified' requirement.

¹⁰ I.R.C. § 7431(a).

¹¹ Documents that are under seal are not currently part of the electronic database. Given that it is sometimes necessary to re-title or correct other errors in e-filing, the Section is concerned that there is too great a chance that a document, which should be filed under seal, would not be due to technology glitches or simply a lack of familiarity with the procedures.

the Service may file a motion to proceed anonymously, or if the facts warrant, to have the case sealed at the time the whistleblower files his or her petition. Where a whistleblower seeks to proceed anonymously, the case is placed under seal until the Court has a chance to rule on the motion to proceed anonymously. For whistleblowers in particular, the ability to proceed anonymously is of the utmost importance. One of the concerns that whistleblowers balance in deciding whether to seek review by the Tax Court is the ability to remain anonymous through the proceedings. Requiring that filings in these cases be done on paper ensures that the documents in these cases are in fact filed under seal. Additionally, keeping these cases off-line ensures that improper access is not given to non-parties. In short, the Section does not believe that the inconvenience to the parties under the current rules requires an immediate change in how the Tax Court handles the filing of these cases.

c. Subpoenas.

The Chief Counsel's letter correctly notes that, under the Court's Rules, third-party subpoenas are only returnable at the call of the calendar on which the case is set for trial. The Section acknowledges that this may inhibit the ability of the parties to review third-party documents sufficiently in advance of trial and to stipulate to those that are not in dispute. To remedy this problem, the Section suggests amending Rule 147 to more closely track Rule 45 of the Federal Rules of Civil Procedure ("FRCP").

Rule 147 should provide that subpoenas *duces tecum* issued to third parties be returnable during some time period prior to the call of a calendar, such as 30 to 60 days. The return can be done by mail or, as provided by FRCP 45(c)(2), "at a place within 100 miles of where the [subpoenaed] person resides, is employed, or regularly transacts business in person."

The party issuing the subpoena and receiving the required records should be further required by an amendment to Rule 147 to provide to the other party or parties copies of both the non-party subpoenas and all responses and documents produced by non-parties.¹² This is similar to what is already required by FRCP 45(a)(4), where notice and a copy of the subpoena must be served on each party prior to service of the subpoena.

The Chief Counsel's suggested amendment to Rule 74(c)(2) to include a presumption of satisfaction of the availability requirement for nonconsensual depositions of third parties should not be needed if Rule 147 is amended as proposed above. Should the Court consider amending Rule 74(c)(2), the Section believes the presumption should not apply, and the party seeking to take the deposition should still have the burden of establishing unavailability.

Similarly, the Chief Counsel's suggested amendment to Rule 110(b) to specifically authorize pretrial conferences for subpoena purposes should not be needed if the Court were to amend Rule 147 as suggested above.

¹² See Order (7/15/2015), *Kissling v. Commissioner*, No. 19857-10.

d. Redaction of identifying data in signature blocks of decision documents.

The Chief Counsel recommends that the signature requirement in Rule 23(a)(3) be modified to provide either that decision documents no longer must contain petitioner's address and phone number, or require that such information be redacted. The Section supports this recommendation. In addition to the concern raised by the Chief Counsel regarding so-called "spear phishing," the Section believes these changes would protect victims of domestic abuse.

Additionally, the Section believes that other documents that contain sensitive personal and financial information should be similarly redacted or sealed. For example, the Application for Waiver of Filing Fee also contains sensitive personal and financial information. The Section suggests that these applications be kept confidential by the Court, similar to the Statement of Taxpayer Identification Number, and not included in the file available for public inspection. The Section suggests the Court amend Rule 12(b) to provide for the confidentiality of this document.

Finally, the Section believes the taxpayer's address and phone number should be moved from the petition to a confidential Statement of Taxpayer Information. In the petition, the taxpayer should only be required to provide the State in which they reside. This is consistent with the information that is publicly available under the Docket Inquiry tab on the Tax Court's website.

e. Imperfect Petitions.

The Section respectfully disagrees with the Chief Counsel's suggestion that petitions be dismissed unless the taxpayer cures an imperfect petition by filing a complete copy of the notice of deficiency or notice of determination. This change would result in the dismissal of many petitions filed by low-income taxpayers, including some petitions filed by low-income taxpayer clinics. In many cases, it is simply not possible to obtain a copy of the notice of deficiency sent to a taxpayer, let alone all the accompanying pages or prior notices incorporated by reference. Taxpayers often contact a low-income taxpayer clinic very late in the 90-day period to file their petition. Many taxpayers do not keep copies of the correspondence they receive from the Service, or they may lose a notice of deficiency or notice of determination. In addition, *pro se* Tax Court petitions are filed by many taxpayers facing serious barriers, including homelessness and functional illiteracy. An automatic dismissal in such cases would impose too severe of a hardship on taxpayers when these notices (to the extent they were issued) are already in the Service's possession.

Furthermore, a taxpayer's failure to attach a copy of the notice of deficiency or notice of determination should not relieve the Service of its obligation under Rule 36 to file an answer within 60 days. Alternatively, if the Service cannot locate any record that a notice was issued, the Service should file a motion to dismiss the case.

When a taxpayer does not pay the filing fee required by Rule 20(d) and does not request a waiver, the Court issues an order to the taxpayer to remit the fee, properly request a waiver, or face dismissal. If the Court deems it appropriate, the Section has no objection to clarifying that such an order tolls the 60-day period for filing an answer. The Section also does not object to the Chief Counsel's request (a) that respondent not be required to answer or otherwise respond to the petition until this jurisdictional issue has been resolved, (b) that the Court set a new answer date upon

satisfaction of its order, and (c) that Rule 25(c) be modified to allow respondent to file a timely answer in circumstances involving an order for an amendment, supplement, or ratification of the petition.

The Section does not object to the Chief Counsel's suggestion that Rule 34(b) be amended by adding a reference to notices of determination. However, the Section believes that a change that is more likely to alter the behavior of *pro se* petitioners is a change to the language of the Tax Court's petition kit, which most *pro se* litigants rely on when preparing to file a petition. We recommend that the simplified petition and instruction sheet state that all pages of explanation or calculation accompanying the notice of deficiency should be included.

f. Whistleblower Redactions.

The Chief Counsel suggests changing the redaction procedure in whistleblower cases under Rule 345 to require parties to file an unredacted version of the document, under seal, along with a redacted version, without identifiers or a reference list. The Section agrees with this recommendation for exhibits that are attached to the filings. However, the Section recommends a different procedure to ensure that information that is under seal pursuant to Rule 345 does not appear in documents that are drafted or created to be filed with the Court.

The Section suggests that the Court adopt a standard set of identifiers that can be used to replace information that should be redacted to prevent the identification of a whistleblower who is proceeding anonymously under Rule 345(a), or to prevent the identification of the taxpayer as required in all cases under Rule 345(b). The Court could adopt a form that would ensure that the same identifiers are used by the whistleblowers and by the Service. The form would also help alert *pro se* whistleblowers to the requirement that they redact taxpayer identifying information under Rule 345(b). The Section has attached a sample draft of this form as Appendix A.

The standard identifiers would not cover the redactions necessary for exhibits. The redaction of exhibits generates numerous numeric identifiers because a new identifier is given each time a new iteration for a piece of information is given. For example, the name of a taxpayer, John Doe could appear several ways: John Doe, J. Doe, Mr. Doe, Doe, JD, John D. Each of these would be given a separate identifier. Consequently, we agree with the suggestion that exhibits be allowed to be filed redacted, without identifiers or a redaction list, along with an unredacted version that is filed under seal. The Section requests that the non-filing party have the opportunity to make additional redactions to a document before it becomes public, to ensure that information that may tend to reveal the identities of either a whistleblower who is proceeding anonymously or the taxpayer was not missed in the initial redactions.

g. Inadvertent Disclosure of Privileged Material.

Although Rule 70(b), *Scope of Discovery*, already contemplates that privileged materials are outside the scope of discovery in matters before the Court, no set procedure currently exists to

guide parties on how to deal with instances of inadvertent disclosure of privileged materials to an adverse party in a proceeding.¹³

The Section agrees with the Chief Counsel's recommendation that the Court promulgate a rule, analogous to those provided in FRCP 26(b)(5)(B), *Information Produced*, and FRCP 502(b), *Inadvertent Disclosure*, that allows a party who has mistakenly produced information in discovery that is subject to a claim of privilege or of protection as trial-preparation material, to notify the receiving party of such 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.

In the alternative, as suggested by the Chief Counsel, the Court could allow the parties to move the Court for a determination of the privilege or work product claim.

h. Administrative Record in Declaratory Judgment Cases.

The Chief Counsel urges the Court to revise the time to file the entire administrative record, fully stipulated, to 45 days prior to trial. While the Section agrees with changing the date when the stipulated administrative record must be filed under Rule 217, the Section believes that the time to submit the administrative record should be earlier in the litigation process than 45 days prior to trial. The Section suggests that the time to file the fully stipulated administrative record be based on when the case is calendared, possibly either 30 or 60 days after the case is calendared.

The Section believes that this change will permit the parties to have ample opportunity to meet and discuss resolution of the case and allow additional time to make the necessary redactions to the records prior to the time to file. However, this date is not so close to trial as to create additional issues when the parties are unable to stipulate to the administrative record. This would allow the parties the time necessary to consider if any additional actions are necessary and give the parties additional time to discuss resolution of the case after submitting the stipulated administrative record, but before trial.

i. Permissive Intervention.

The Chief Counsel, citing *Huff v. Commissioner*,¹⁴ recommends 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.”

Although the Court does not have a rule relating to intervention generally, Rule 1(b) provides that if “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

¹³ See Order (5/14/2015), *Eaton Corp. v. Commissioner*, (No. 5576-12).

¹⁴ 743 F.3d 790 (11th Cir. 2014).

Civil Procedure to the extent that they are suitably adaptable to govern the matter at hand.” FRCP 24(a)(2) provides for intervention of right to “anyone” who “claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant’s ability to protect its interest, unless existing parties adequately represent that interest.” FRCP 24(b) provides for permissive intervention, and FRCP 24(b)(2) specifically provides for permissive intervention by a federal or state governmental officer or agency “if a party’s claim or defense is based on (A) a statute or executive order administered by the officer or agency; or (B) any regulation, order, requirement, or agreement issued or made under the statute or executive order.”

Huff is one of several cases in which the Service challenged the residency of purported residents of the U.S. Virgin Islands in which the government of the U.S. Virgin Islands (USVI) sought to intervene, both as a matter of right under FRCP 24(a) and permissively under FRCP 24(b)(2). The Court has denied the USVI’s motion in every case, and there is a Circuit split as to whether the Court applied the appropriate standard in denying the USVI’s motions to intervene.¹⁵

While the Section supports the general principle that the Tax Court should be able to establish its own rules and not be subject to second-guessing by circuit courts, the Section believes that the Service’s recommendation goes too far and requires more study before a narrowly tailored rule change can be recommended. The Section disagrees that intervention as a matter of right is “inappropriate” in the Tax Court in all cases, and notes that both the Code and the Court have identified certain circumstances—such as innocent spouse cases—in which intervention as a matter of right is entirely appropriate and, in fact, available.¹⁶ The Section is concerned that a rule intended to address a specific situation (similar to that in *Huff*) could have broader consequences. If a discretionary rule were created, intervention could be attempted in a broad array of cases and result in the potential wasting of the Court’s time and resources.

There are other circumstances in which intervention is not directly addressed by either the Code or the Court’s Rules—such as whether a party with a remainder interest in a trust may intervene in cases involving the trust—where intervention may be advisable.

If the Court ultimately adopts a rule similar to FRCP 24, the rule should specify that the intervenor is subject to all Court rules and obligations that apply to the taxpayer and the Service. This includes the obligation to redact information under Rule 27.

¹⁵ The Third and Eighth Circuits have held that the Tax Court did not apply the appropriate standard (*see Appleton v Commissioner*, 430 Fed. Appx. 135 (3d Cir. 2011); *Coffey v. Commissioner*, 663 F.3d 947(8th Cir. 2011)), while the Fourth Circuit has held that the Tax Court did apply the correct standard in denying USVI’s motion (*see McHenry v. Commissioner*, 677 F.3d 214 (4th Cir. 2012)).

¹⁶ *See* I.R.C. § 6015(e)(4) (“The Tax Court shall establish rules which provide the individual filing a joint return but not making [an innocent spouse claim] . . . with adequate notice and an opportunity to become a party to a proceeding...” This instruction from Congress is reflected in Rule 325, which requires the Service to serve notice of the petition on the non-requesting spouse and provides that the “notice shall advise the other individual of the right to intervene” in the case (emphasis added).

j. Deposition of Party Witness.

The Chief Counsel proposes that Rule 74 be amended to allow nonconsensual depositions of party witnesses without requiring leave of the Court. The Section strongly opposes the Chief Counsel's suggestion. In tax cases the Service generally has three years to examine a taxpayer, request information, and develop its position before issuing a notice of deficiency determining changes to the taxpayer's return. For these reasons, the taking of a deposition without the consent of the opposing party should remain "an extraordinary measure of discovery."

First, the Section believes that the proposed change is not necessary. The Chief Counsel's letter correctly notes that many cases before the Court have already had extensive factual development during the examination stage, as well as during the informal exchange of information required by the Court's Rules. The Rules further contain consequences to a party for failure to comply with these requirements. Under the current Rules, the Court has discretion to allow nonconsensual depositions of a party witness if warranted under the specific facts of the case and after a demonstration of such need by the Service. Further, the Service can request a pretrial conference and in extreme cases can move for the exclusion of testimony or documents from evidence.

Second, the Chief Counsel's proposal is not limited to highly complex cases, and it would negatively impact *pro se* taxpayers. If *pro se* taxpayers are threatened with a nonconsensual deposition by counsel, they may be more likely to concede a meritorious case, or risk sanctions by failing to comply with the deposition notice. Further, without any discretion by the Court on depositions of party witnesses, the Section is concerned that deposing *pro se* taxpayers could become standard practice by the Office of the Chief Counsel. As noted above, the Service already has sufficient tools for taxpayers that are nonresponsive. Moreover, the notice of deficiency is presumed correct and taxpayers generally bear the burden of proof.

If the Court were to amend Rule 74, any expansion of party depositions should be mutual. The Chief Counsel focuses solely on nonconsensual depositions of taxpayers, without proposing a similar right with respect to respondent's personnel. While the Section is aware of the limitations of going behind the notice of deficiency,¹⁷ there are circumstances in which the Service's position in a particular case, especially highly complex cases such as transfer pricing cases, is known by technical advisors and other employees who are typically not available to petitioners at any time, including during the examination and Appeals phases.

k. Relief from Final Decision.

The Chief Counsel suggests that the Court's ability to vacate its decisions once they become final is limited and applies only in cases where: (1) there is fraud on the Court; (2) the Court did not acquire jurisdiction over the taxpayer; or (3) there is a clerical error discovered in a final decision. As a result, the Chief Counsel recommends that the Court adopt a rule similar to FRCP 60(b) and allow for correction of errors in final decisions based on mutual mistake. We understand that, in proposing this change, the Office of Chief Counsel is primarily concerned

¹⁷ See *Greenberg's Express, Inc. v. Commissioner*, 62 T.C. 324 (1974).

about cases of mutual mistake or clerical errors, such as transposing numbers or tax years, as in *Seven W Enterprises, Inc. v. Commissioner*.¹⁸

FRCP 60(b) permits a court to “relieve a party . . . from a final judgment, order, or proceeding” for several reasons, including “mistake, inadvertence, surprise, or excusable neglect.” The rule also provides additional grounds for relief, including newly discovered evidence, fraud, or any other reason that justifies relief. FRCP 60(c) requires a motion under FRCP 60(b) to be made within a “reasonable time” after the entry of the judgment or order and, for reasons of mistake, no more than a year after the entry of judgment.

The Section is sympathetic to the need for a mechanism to correct mistakes and inadvertent errors, but, rather than adopt a new rule, we propose that the Court consider revising Rule 162 to allow motions on the basis of mutual mistake, similar to FRCP 60(b)(1). In addition, we agree with the Chief Counsel that the 30-day period to file a motion under Rule 162 may not be sufficient to allow parties to discover errors and move for revision. We suggest that the Court consider expanding the allowable time period to 90 days.

1. Calendars.

The Chief Counsel recommends that cases be set for trial six months before calendar call, instead of the current five-month notice period. The Section opposes this proposed change because it would further delay the resolution of many cases before the Court, especially for taxpayers in locations that the Court visits less frequently. The Court has many places of trial where there is a small tax case calendar, a regular tax case calendar, or a hybrid calendar only once a year. If a taxpayer misses the trial calendar deadline, the case could take a year longer to resolve. Low-income taxpayers, in particular, cannot afford to travel to a more distant place of trial in order to have their cases heard sooner. The Section believes the Court’s current practice is sufficient and any benefits to the Service in terms of trial preparation are outweighed by the potential delay in resolution of cases for taxpayers.

However, should the Court agree with the Chief Counsel that cases ideally should be set for trial six months before calendar call, the Section suggests a rolling calendar as a compromise. If the calendar is not filled with cases when scheduled six months before trial, the Court could continue to add cases until five months prior to the start of the trial session or until the calendar is full. A rolling calendar would in many cases give the parties additional time to prepare for trial, while not requiring taxpayers who reside in trial locations that are visited less often to wait the additional time to have their cases heard.

¹⁸ 723 F.3d 857 (7th Cir. 2013).

II. Additional Proposals for Rule Changes.

The Section makes the following additional proposals to improve practice before the Tax Court:

a. Notification of Electronic Service.

The Section suggests that the Court include the name of the case and the name of the document being served in the email that is automatically generated to alert a practitioner to a new document that has been filed. The addition of the name of the case and the name of the document being served will allow a practitioner to know how urgent a particular document might be. Additionally, this change would bring the Tax Court's practice in line with that of the other Federal Courts that use PACER.

b. Changes to Rule 91(f).

The Section suggests a change to Rule 91(f) to ensure that Rule 91(f) motions are being used for the intended purpose and not to force stipulations under threat of filing a motion for sanctions. Rule 91(f) motions might be misused at times either as an attempt to force a stipulation regarding an issue or ultimate fact that is reasonably in dispute or by failing to follow the mandates of the Tax Court Rules regarding when the motion is appropriate and what should be included in the motion. The Section proposes that Rule 91(f) be amended by adding the underlined language below to clarify the requirements of a 91(f) motion and to curb the inappropriate use of these motions: “The motion shall: (A) recite with particularity the multiple ways a party has refused or failed to confer with an adversary with respect to entering into a stipulation, (B) show with particularity and by separately numbered paragraphs each matter which fairly should not be in dispute and which is claimed for stipulation... (D) set forth with particularity the pages within particular sources, reasons, and basis for claiming the matter fairly should not be in dispute, with respect to each such matter, that it should be stipulated...” These changes will make it clearer to the Court at the time of filing whether the motion or a particular paragraph within the motion is appropriate; an inappropriate motion will be apparent by its failure to recite particular facts or point to a discrete source to show that the matter is not fairly in dispute.

c. Status Conferences.

The Section recommends that the Court's rules provide for a mandatory telephone status conference no less than 45 days prior to trial in cases with unrepresented taxpayers. The Section also recommends that a stuffer notice be sent with the notice of status conference.

d. Petition Kit.

The Section recommends adding a hyperlink to the Application for Waiver of Filing Fee in the petition kit, on the instruction page. The Section also recommends that the Court consider adding a link to a simple explanation of the Tax Court process.

e. Service of Documents.

In cases in which the address of one party is being kept confidential, the Section recommends that Rule 21 be amended to provide that the Court will effect service on that party.

f. Evening Session.

The Section recommends that the Court consider holding evening hours once per trial session, exercising its discretion as to which taxpayers qualify for evening hours. The evening session would accommodate taxpayers who, for good cause shown, are unable to attend court during normal business hours (such as the inability to get time off work without adverse consequences and the inability to obtain child care). We suggest that the Court provide notice to taxpayers of the option to request an evening trial prior to the calendar call. This could be similar to the existing process for requesting a time and date certain for trial, which is often outlined in a Standing Pretrial Notice.

g. Tax Court Waiver Fee Denial.

The Section proposes that if an application for waiver of the filing fee is denied, the denial notice contain instructions for how the taxpayer can request reconsideration. For example, the denial notice could state, “Your request for a waiver of the filing fee is denied. You may ask the Court to reconsider this decision. To ask for reconsideration, mail a letter to the Court explaining why you disagree. Your letter must be mailed by [DATE]. Attach any documents that support your request.”

The Section notes that motions to reconsider are not specifically mentioned in the Rules, except for in the post-trial context under Rule 161. The Section recommends that the Court adopt a new Rule 58 setting out the appropriate time limits applicable to all motions to reconsider and that current Rule 58 become new Rule 59.

h. Request for Place of Trial.

The Section disagrees with the proposal by a commenter that Rule 140 be amended to require every taxpayer to justify the requested place of trial. The Section fails to see the need for the additional burden this amendment would place on taxpayers. Currently, a significant number of *pro se* taxpayers fail to correctly complete the Court’s Request for Place of Trial form. This amendment would increase taxpayer confusion and, without an adequate justification, unnecessarily burden taxpayers.

UNITED STATES TAX COURT

<p style="text-align: right; margin: 0;">Petitioner,</p>	}	Docket No. _____
V.		
COMMISSIONER OF INTERNAL REVENUE, Respondent		

PETITIONER’S REFERENCE LIST

The list below lists the identifier and the information that it corresponds to in Petitioner’s petition.

1. Whistleblower – _____
 2. Whistleblower Address – _____
 3. Whistleblower State - _____
 4. Taxpayer 1 – _____
 5. Taxpayer 1 Address – _____
 6. Taxpayer 2 – _____
 7. Taxpayer 2 Address – _____
 8. Tax Underpayment Scheme (TUS) – _____
-
9. Date of _____ – _____
 10. Date of _____ – _____
 11. Date of _____ – _____
 12. _____ – _____
 13. _____ – _____
 14. _____ – _____

Petitioner’s or Petitioner’s Representative Signature	Date
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