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May 25, 2022

The Honorable Maurice Foley
Chief Judge
United States Tax Court
400 Second Street, NW
Washington, DC 20217

Re: Proposed Amendments to Tax Court Rules of Practice and Procedure

Dear Chief Judge Foley:

Enclosed please find comments with respect to proposed amendments to the Tax Court rules of practice and procedure. These comments are submitted on behalf of the Section of Taxation and have not been reviewed or 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 these comments with you or your staff.

Sincerely,

Julie A. Divola
Chair, Section of Taxation

Enclosure

cc: Hon. Charles P. Rettig, Commissioner, Internal Revenue Service
Drita Tonuzi, Deputy Chief Counsel (Operations), Internal Revenue Service

AMERICAN BAR ASSOCIATION
SECTION OF TAXATION

COMMENTS ON THE PROPOSED AMENDMENTS TO THE TAX COURT RULES OF PRACTICE AND PROCEDURE AND CONFORMING AMENDMENTS

These comments ("**Comments**") are submitted on behalf of the American Bar Association Section of Taxation (the "**Section**") and have not been reviewed or 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 were exercised by Mitchell I. Horowitz and Zhanna A. Ziering, the Chair and Vice Chair, respectively, of the Committee on Court Procedure and Practice. The following individuals provided substantial assistance in drafting these Comments: Elizabeth Blickley, Curtis Elliott, Aaron M. Esman, Carina Federico, Brandon Keim, Sam Lapin, Catherine Livingston, Sarah Lora, Sara Neill, Andrew Roberson, Nancy Rossner, Lawrence Sannicandro, William Schmidt, Samantha Skabelund, Caleb Smith, and James Steele. These comments were reviewed by John Colvin of the Committee on Government Submissions, and Kurt Lawson, the Section's Vice Chair for Government Relations.

Although members of the Section may have clients who might be affected by the federal tax principles and court procedures addressed by these Comments, no member who has been engaged by a client (or who is a member of a firm or other organization that has been engaged by a client) to make a government submission with respect to, or otherwise to influence the development or outcome of one or more specific issues addressed by, these Comments has participated in the preparation of the portion (or portions) of these Comments addressing those issues. Additionally, while the Section's diverse membership includes government officials, no such official was involved in any part of the drafting or review of these Comments.

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Date: May 25, 2022

I. EXECUTIVE SUMMARY

On March 23, 2022, Chief Judge Maurice B. Foley announced by press release (the "**Release**")[1] that the United States Tax Court (the "**Tax Court**" or "**Court**") proposed amendments to its Rules of Practice and Procedure (the "**Rules**"). According to the Release, the amendments are proposed in response to suggestions and comments the Court received from the Court's Judges and staff, the Office of Chief Counsel of the Internal Revenue Service (the "**Service**"), and the Tax Court bar over the last few years. They also seek to fill gaps in the Court's existing procedures and reflect the Court's ongoing effort to simplify and modernize the rules and conform it to the extent possible to the Federal Rules of Civil Procedure. In the Release, the Court invited the public to submit for consideration any comments regarding these proposed amendments (the "**Proposed Amendments**"). These comments are submitted in response to that invitation. The American Bar Association Section of Taxation (the "**Section**") commends the Tax Court's commitment to simplify and modernize the Rules and appreciates the opportunity to provide comments on how to improve practice before the Tax Court with regard to these proposals.

Below is a brief summary of our recommendations. A more expansive analysis of individual sections is found in the body of the Comments.

- Proposed New Rule 63(b)(2) – Proposed Rule 63(b)(2) provides a constructive opportunity for a federal or state government officer or agency to intervene in a tax case, but the Section remains concerned about the effect of such intervention on the taxpayer's cost of litigation. The Section suggests that Rule 63(b)(2) include additional procedural safeguards and/or limits based on the amounts in controversy to temper the increase in the taxpayer's cost of litigation directly resulting from the permissive intervention of the government officer or agency.

- Rule 70 – The Section generally supports amendments to Rule 70 to conform it more closely to the Federal Rules of Civil Procedure[2] and welcomes the inclusion of the proportionality principles into the language of the Rule. The Section suggests that litigants would greatly benefit from the uniform application of the rule of proportionality embodied in Rule 70(b), which can be achieved by the Court's publication of precedential opinions on its application of the rule. The Section further requests that the Court consider adopting rules setting limits on the number of interrogatories and document requests that the parties may serve; such limits may be adjusted within the Court's discretion and upon showing of good cause. The Section also suggests that the Court consider adding language to Rule 70(c)(2) that mirrors the requirements of Rule 147(a)(1)(c), *i.e.*, that a command

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[1] *Notice of Proposed Amendments to the Tax Court Rules of Practice And Procedure and Conforming Amendments* (March 23, 2022), available at https://www.ustaxcourt.gov/resources/press/03232022.pdf.

[2] Hereinafter abbreviated "FED. R. CIV. P." in citations.

in a subpoena to produce documents, electronically stored information, or tangible things requires the responding person to permit inspection, copying, testing, or sampling of materials. Finally, the Section recommends that an additional provision be added to the Rule which addresses procedures for remedying inadvertent disclosure of privileged material, similar to FED. R. CIV. P. 26(b)(5)(B).

- Rule 74(c) – The Section requests that the Court consider adding language to the Rule cross-referencing the proportionality principals espoused in proposed Rule 70(b).

- Proposed New Rule 92 – The Section generally supports the addition of Rule 92 requiring the filing of the administrative record at the earlier stages of the litigation. The Section requests that the Court consider adding language to Rule 92 that would permit the parties to seek leave of the Court to submit the administrative record after completion of discovery upon showing of good cause. Further, the Section suggests that better consistency among the cases can be achieved if the due date for the filing of the administrative record is tied either to the date of trial or to the filing of the petition. The Section also recommends amending the proposed language contained in Rule 92 as follows: (1) revise proposed Rule 92(a) to state "appropriately certified as to its authenticity in accordance with FED. R. EVID. 901 or 902"; (2) add the words "complete and" to "supplement" within proposed Rule 92(b); and (3) adopt a broader definition of "administrative record" in proposed Rule 92(c) to include "all the material that was received, developed, and/or considered by the agency in connection with making its decision." Finally, the Section suggests eliminating proposed Rule 92(e), and allowing the cases covered by that provision to engage in discovery with standard discovery procedures. Alternatively, the Section proposes that the cases to which the rule applies be enumerated in Rule 92(e) and the requirements of the rule be included in the Court's earliest correspondence to petitioners.

- Rule 121 – The Section generally supports the amendments to Rule 121. The Section requests that the Court clarify proposed Rule 121(j) to address how and whether the Rule will apply in the context of supplements to the administrative records. The Section also requests that proposed Rule 121(j) be clarified to address whether a movant must show that there is no genuine issue of material fact in cases reviewed under the *de novo* standard but in which the scope of review is limited to the administrative record. Finally, the Section suggests that Rule 121(a)(2) be clarified by adding the following sentence to the provision: "The Court shall grant partial summary judgement on that part of the legal issues in controversy if the movant shows that there is no genuine dispute as to any material fact pertaining to the specific issue for which partial summary judgment is sought."

- Rule 147 – The Section generally supports the amendments to Rule 147 and the Court's endeavor to conform it to FED. R. CIV. P. 45. The Section suggests revising proposed Rule 147(d)(3)(A) to specify that the time for attendance or

production of information must not be less than 15 days from the date of service unless the serving party first seeks leave from the Court and provides a showing of exceptional circumstances justifying a shorter response period. The Section also recommends that proposed Rule 147(d)(3) add language clarifying that upon filing of a motion to quash or modify, the subpoena recipient's obligation to respond to the subpoena is suspended until the Court rules on the motion and requiring that any motion to quash or modify a subpoena be served on the recipient of the subpoena.

- Proposed New Rule 152 – The Section commends the Tax Court on the addition of proposed Rule 152 and believes this is an important development that will benefit taxpayers, the Commissioner of Internal Revenue, and the Court. The Section recommends that the Court adopt the position articulated in Rule 37(a) of the Rules of the Supreme Court[3] and Rule 29(a)(2) of the Federal Rules of Appellate Procedure,[4] which permits an amicus curiae brief to be filed upon consent of all parties without requiring leave of the Court. The Section also suggests that proposed Rule 152(g) provide additional guidance for evaluating when objections are warranted and proposes that Rule 152(g) require that any objection to specifically address why the party believes the administration of tax laws would be hindered by allowing the filing of an amicus brief and provide a rebuttable presumption that amicus briefs filed on behalf of *pro se* parties are justified. The Section requests further guidance to proposed Rule 152(d) setting forth procedures for requesting enlargement of the 25-page limit for an amicus brief. The Section also suggests adding the following sentence at the end of proposed Rule 152(e): "Leave shall be freely given when justice so requires." Finally, in order to generate timely attention to issues that would most benefit from the filing of an amicus brief, the Section recommends that the Court publish online designated orders listing those cases that involve *pro se* petitioners and are likely to involve or would benefit from further briefing on the issues.

- Rule 210(b)(5) – The Section suggests additional amendments to Rule 210, including revisions to Rule 210(b)(3) in accord with section 7428(a)(1)(E)[5] by amending the definition of an "exempt organization" to "an organization described in Code section 501(c) or 501(d) and exempt from tax under Code section 501(a) or an organization described in Code section 170(c)(2)."

The Section would be happy to answer any questions the Court might have or discuss this matter further. Thank you for the opportunity to provide comments on the proposed amendments to the Rules.

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[3] Hereinafter abbreviated "Supreme Court Rules" in citations.

[4] Hereinafter abbreviated "FED. R. APP. P." in citations.

[5] Unless otherwise indicated, references to a "section" are to a section of the Internal Revenue Code of 1986, as amended (the "Code" or "I.R.C."), as in effect as of the date of these Comments.

II. RECOMMENDATIONS

A. Proposed New Rule 63(b)(2): Permissive Intervention by a Government Officer or Agency

Proposed Rule 63(b)(2) provides that the Court may permit a Federal or State governmental officer or agency to intervene 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. This proposed rule is substantially similar to Rule 24(b)(2) of the Federal Rules of Civil Procedure. While we believe that offering government officers or agencies not directly involved in the dispute an opportunity to weigh in on the issue has merit, we are concerned that the intervention may have significant effect on the taxpayers' cost of litigation. The Court is the only prepayment forum available to taxpayers to dispute a proposed tax assessment. Ability to access judicial review without prior payment makes the forum significantly more accessible to taxpayers of various economic means, many of whom would not be able to meet the full payment requirement of a refund claim, let alone to afford the cost of litigation. Allowing other federal and state agencies to have a broad ability to intervene in a tax case may unnecessarily prolong the litigation and make it more adversarial, thus potentially significantly increasing its cost. Litigating on multiple fronts may become cost prohibitive to many taxpayers, forcing them to abandon the case altogether.

Although permissive intervention under proposed Rule 63(b)(2) is already subject to the Court's discretion under proposed Rule 63(b)(3), given the unique nature of the Tax Court, the Section suggests further tempering the potential for unintended consequences of proposed Rule 63(b)(2) by either providing for procedural safeguards and/or limits based on the amounts in controversy. For example, the Rule could provide limits on the intervenor's role if the amount in controversy related to the issue for which intervention is sought is below $50,000. Additionally, the court may consider creating a procedure for taxpayers to seek sharing of their legal fees with the intervening party if the cost of litigating that issue exceeds the related amount in controversy. Left unrestricted, proposed Rule 63(b)(2) could have a chilling effect on taxpayers seeking to resolve their tax dispute in the most affordable and accessible forum.

B. Rule 70: Discovery – General Provisions

The Section commends the Court for revising its discovery rules to more closely conform with the Federal Rules of Civil Procedure. The Section recommends that the Court include a provision that aligns with FED. R. CIV. P. 26(b)(5)(B), specifying that if a party inadvertently produces or discloses privileged material, there is a procedure by which the producing party can claw back the privileged material without the disclosure acting as a waiver of privilege.

1. Rule 70(b) - Scope of Discovery

The Section commends the Court for directly incorporating the rule of proportionality into the language of proposed Rule 70(b)(1). Generally, taxpayers have the burden of proof as to certain credits, deductions, and filing status. The Service has the initial burden of proving that certain items constitute income. The Service also has the burden of production for penalties. Once the Service meets its initial burden establishing unreported income and penalties, the burden of proof shifts to the taxpayer to demonstrate that the disputed item should not be included in income, or the penalty does not apply. The Service has great power through examination and access to bank records, Social Security Administration records, and summonses to obtain the required records to allege income and the applicability of penalties by way of a Statutory Notice of Deficiency ("**SNOD**"), Final Partnership Administrative Adjustment ("**FPAA**"), Notice of Proposed Partnership Adjustment ("**NOPPA**"), or other notice. Accordingly, before any petitioner files in Tax Court, the government is often in receipt of significant amounts of documents and information to defend any case in Tax Court, in some instances more information than the petitioner possesses.

For these reasons, discovery in most cases includes an exchange of records showing where income originated, how entities were formed, receipts for transactions, the Service administrative file, and other business records that reflect the flow of money and the creation of deductible items or credits. Generally, this task is completed informally through *Branerton*[6] requests and responses, and the case proceeds quickly to resolution or trial.

However, when the petitioner is an entity, the Service in some cases has proceeded as though no request is too great because it might lead to the discovery of admissible evidence. Accordingly, discovery requests may seek information about years, entities, and items not at issue in the case before the Tax Court. Taking into account the needs of the case, the amount in controversy, limitations on the taxpayer's resources, and the importance of the issues at stake in the litigation, such requests have been unduly burdensome in some cases.

Rule 1(d) (both current and as proposed) requires that the Rules be construed "to secure the just, speedy, and inexpensive determination" of the case. Increasingly, litigation in Tax Court has become more expensive than litigation in district courts. There are limitations on discovery in district court.[7] There, litigants must use their

[6] *Branerton Corp. v. Commissioner*, 61 T.C. 691 (1974).

[7] *See, e.g.,* FED. R. CIV. P. 30(a)(2)(A)(i) (limiting parties to 10 depositions each); FED. R. CIV. P. 30(d)(1) (deposition length is limited to one day of seven hours); FED. R. CIV. P. 33(a)(1) (maximum of 25 interrogatories, including discrete subparts); Dist. MA, Local Rule 26.1(c) (10 depositions, 25 interrogatories, 25 requests for admission, and 2 separate sets of requests for production). *See also* Rule 190 of the Texas Rules of Civil Procedure (deposition testimony is limited to 20 hours, 15 interrogatories, 15 requests for admission, and 15 requests for production of documents).

discovery wisely because once the limits are exhausted, the parties must proceed regardless of whether they have obtained what they need through discovery.

While directly incorporating the rule of proportionality shows the Court will consider these concerns, it would also be helpful if the Court provided guidance with respect to the application of the proportionality standard. Unlike district court orders on discovery issues, which are easily accessible, the Court's rulings on discovery are typically contained in unpublished orders. Publishing a precedential opinion applying the rule of proportionality and setting the Court's standards for balancing the burden of discovery against its likely benefit would provide litigants with a useful discovery roadmap, thus minimizing future discovery disputes or at the very least enhancing the court's ability to efficiently resolve such disputes.

Discovery is often limited by mutual agreement of the parties when the taxpayer is unrepresented. However, the Court has outlined no limitation in cases when the taxpayer is represented, regardless of the taxpayer's resources. Likewise, an additional benefit to taxpayers (and, ostensibly, the government) would be to limit discovery in time or scope. Many taxpayer representatives have been on the receiving end of a formal or informal discovery request from the government that is exceedingly broad, given the issues in the case. Each taxpayer representative replies to these requests citing the rule that the request is "unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation" and instead provides a limited response that includes the relevant documents or information. Traditionally, this satisfies the government request, and the parties move on to trial. Nevertheless, there is a cost to responding to overly broad discovery requests, especially if there are multiple rounds of them. *Branerton* requires the parties to work informally before proceeding to formal requests, but taxpayer representatives are on occasion bombarded by formal and informal requests that are so broad and lengthy that it seems the only conceivable purpose could be to drain the petitioner's resources.

Overreaching discovery requests can be particularly problematic when the petitioner is an entity. For partnerships, the Internal Revenue Code establishes that the government deal with either a Tax Matters Partner (in TEFRA cases) or a Partnership Representative (in BBA cases), rather than individual partners. Similarly, where the petitioner is a corporation, the government generally deals with the entity, the entity's representative (and perhaps the Chief Executive Officer) rather than all board members and employees. However, the government increasingly reaches beyond the statutorily defined representatives by requesting extensive non-consensual third-party depositions of persons associated with the entity. For example, in proceedings where the petitioner is a partnership, the government sometimes contacts individual partners to provide potential partner-level defenses during discovery of the partnership-level case.

In addition to issuing a published opinion addressing the application of the proportionality rule, the Section suggests that the Court consider adopting rules which set limits on the number of interrogatories and document requests that the parties may serve,

which may be adjusted within the Court's discretion and upon showing of good cause.[8] The Section believes that such limits would efficiently curtail litigants' overburdensome discovery tactics and limit the need to seek the Court's assistance is settling discovery disputes.

2. Rule 70(c)(2) - Electronically Stored Information

The Section suggests that the Court consider adding to Rule 70 the same requirement as appears in Rule 147(a)(1)(c), *i.e.*, that a command in a subpoena to produce documents, electronically stored information, or tangible things requires the responding person to permit inspection, copying, testing, or sampling of materials. In cases involving a voluminous number of documents, testing or sampling certain electronically stored information is often an effective way for parties to come to an agreement without Court intervention to narrow the scope of document requests and reduce the burden and expense on the producing party, while also getting the requesting party the information it seeks. At the end of discovery, parties in a case before the Court must work towards stipulations of fact. By narrowing the number of documents produced in discovery, the stipulations of fact process may also be simplified.

While the inclusion of electronically stored information in the Rules may have made some discovery easier, it has not altered the general standard of a reasonable inquiry found in Rule 70(f) (signing of discovery requests, responses, and objections) or Rule 90(c) and (d) (requests for admissions).[9]

C. Rule 74(c): Depositions Without Consent of Parties

Although the Explanation to the proposed Rule in the Release states that no substantive change is intended with respect to this rule, the Section is concerned with the government's increasingly routine requests in many cases for multiple depositions and the Court's increasing frequency of granting such requests. Further, after securing the right to several non-consensual depositions, the government has, on occasion, gone back and obtained the right to take additional depositions in the same case, even when the party is available for trial.[10]

Where both parties have the ability to subpoena these witnesses for testimony at trial and where the parties have equal rights in questioning the witness, third-party depositions result in unnecessary costs and impose other burdens on petitioners as the

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[8] *See, e.g.*, FED. R. CIV. P. 33(a).

[9] *See* Order, *Dynamo Holdings v. Commissioner*, U.S. Tax Ct. Dkt. No. 2685-11, 2016 WL 4204067 (July 13, 2016).

[10] For a discussion of how the government is attempting to make nonconsensual depositions routine, *see* Hale E. Sheppard, *Series of Tax Court Orders Allowing Nonconsensual Depositions by IRS: Aberration or Trend?*, Taxation of Exempts, March/April 2022, 4 (also available at https://www.chamberlainlaw.com/assets/htmldocuments/Nonconsensual%20depositions%20by%20the%20IRS.pdf).

information sought will have to be presented again at trial. Additionally, these depositions do not constitute evidence in the case, but are intended to narrow the issues for trial. However, when completing the stipulation of facts, typically no party will stipulate to the truthfulness of testimony of a third-party witness, especially one who may be hostile due to adverse interests.[11] Accordingly, multiple depositions are a burden that the Court has routinely denied in the past and should routinely deny in the future, absent any truly extraordinary factual showing that the witness is not available for trial.[12] At a minimum, to curtail a party's overuse of non-consensual depositions, the Section requests that the Court add language to Rule 74(c) explicitly cross-referencing the proportionality principals contained in proposed Rule 70(b).

D. Proposed New Rule 92: Identification and Certification of Administrative Record in Certain Actions

1. Timing of the Filing of the Administrative Record

Proposed Rule 92(a) generally requires the parties (or the Commissioner, if the parties cannot stipulate to the record) to file the entire administrative record with the Court no later than 30 days after the notice of setting the case for trial is served. As a preliminary matter, the Section questions the impact of Rule 92(a) on the parties' ability to adequately prepare and present the case to the Court for decision. Historically, this Rule, and analogous rules in the district courts governing cases decided on the administrative record, required the parties to file the administrative record after completion of discovery and after the parties had the opportunity to ready a case to be submitted for decision.[13] Although the Section recognizes the Court's objective in adopting the rule requiring the filing of the administrative record during the earlier stages of litigation, the Section suggests that the Court consider allowing the litigants to seek leave of the Court to submit the administrative record after completion of discovery upon a showing of good cause.

Moreover, the Section has concerns about the proposed timeline for submission of the administrative record. We believe that tying the time within which the administrative record must be filed to the notice of trial is problematic because the date the notice of trial is served can vary from case to case. Further, an issue that requires review of the administrative record may be raised after a notice setting the case for trial is served (*e.g.*, a request for relief from joint and several liability that is asserted in an amendment to the

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[11] *See T. Rowe Price Small-Cap Fund, Inc. v. Oppenheimer & Co., Inc.*, 174 F.R.D. 38, 44-45 (S.D.N.Y. 1997).

[12] *DeLucia v. Commissioner*, 87 T.C. 804, 813 (1986); *K & M La Botica Pharm. Inc. v. Commissioner*, T.C. Memo. 2001-33; *Westreco v. Commissioner*, T.C. Memo. 1990-501.

[13] Rule 24(g)(2) provides that a lawyer generally may not represent a party at trial if the lawyer is likely to be a necessary witness (the "lawyer as witness rule"). It is not uncommon in tax controversy matters for the taxpayer to be represented by the same practitioner before the Service and the Court. And, in cases in which the substance of the administrative record is relevant or questioned, the lawyer as witness rule is likely to be implicated. Thus, the proposed timing rule may simply be unworkable in cases where the lawyer as witness rule is implicated and a motion to disqualify is made.

petition). The varying timeline of Court litigation as well as the possibility for new issues may cause significant conflicts between the due date for filing the administrative record and other deadlines that are tied to the beginning of a trial session, such as the deadline for filing motions for summary judgment or the equivalent (*e.g.*, motions to remand in collection review proceedings). The Section proposes the following deadlines as alternatives to the current date for filing the administrative record:

- Tying the due date for filing the administrative record to the date on which the case is set for trial, but allowing the deadlines to reset upon the granting of a motion for continuance of trial and a new notice of setting the case for trial; or

- Tying the due date for filing the administrative record to the filing of the petition to allow the Commissioner the ability to review the facts of the case before filing an answer.

2. Clarification Regarding Certification

Proposed Rule 92(a) requires that the parties stipulate to the genuineness of the administrative record, or if they are unable to stipulate, that the Commissioner certify the genuineness of the administrative record. To avoid confusion, we recommend that the term "genuineness" be replaced with "authenticity" to bring it in line with FED. R. EVID. 901 and 902. Further, we recommend that the Court reference the Federal Rules of Evidence to aid *pro se* petitioners by revising the last sentence of Rule 92(a) to state "appropriately certified as to its authenticity in accordance with FED. R. EVID. 901 or 902."

3. Motions to Complete the Record vs. Motions for Leave to Supplement the Record

Proposed Rule 92(b) is entitled "Motion to Supplement." The proposed rule allows a party to move to "supplement" the administrative record if a party contends the record is "incomplete." In the context of Administrative Procedure Act ("**APA**")[14] litigation, after the defendant files the administrative record, a party may ask the Court to consider additional documents in one of two ways. First, a party can file a "motion to complete the record," in which a party seeks to add documents to the record that were actually considered by the agency in making the challenged decision but allegedly omitted from the administrative record.[15] Alternatively, a party can file a motion for leave to supplement the administrative record if the documents at issue were allegedly not considered by the agency in reaching its decision.[16] Accordingly, we recommend adding the words "complete and" to "supplement" as we believe this conjunction more accurately reflects the Court's intention and conforms more closely with generally

[14] Pub. L. No. 79-404, 60 Stat. 237 (1946).

[15] *Poplar Point RBBR, LLC v. United States*, 145 Fed. Cl. 489, 494 (2019).

[16] *See id.*; *see generally* Peter Constable Alter, *A Record of What? The Proper Scope of an Administrative Record for Informal Agency Action*, 10 UC IRVINE L. REV. 1045, 1057 (2020).

accepted terminology in APA law. Additionally, to the extent the Court anticipates adopting a specific procedure for allowing a motion for leave to supplement the administrative record (*i.e.*, to modify the content of the purported administrative record), we recommend that the Court include specific rules governing such procedures.

4. Definition of Administrative Record

Proposed Rule 92(c) defines the term "administrative record" by reference to various items that typically make-up the administrative record in a tax case, such as requests for a determination or agency action, written correspondence between the Service and the taxpayer, and the notice of determination, among other things. The proposed definition of the term "administrative record" may not reach all of the items that currently, or may in the future, make-up the administrative record (*e.g.*, information the Service employee learns from the Service's records but does not reduce to writing or some form of digital evidence). We recommend that the Court adopt a broader definition of the term "administrative record" as "all the material that was received, developed and/or considered by the agency in connection with making its decision."[17]

5. Deficiency Cases

Proposed Rule 92(e) provides that the Court may direct the parties to identify and certify the administrative record even where judicial review is not based partly on the administrative record. We suggest that proposed Rule 92(e) be eliminated; if the Court's review is not at least partly based on the administrative record, we recommend that the parties be allowed to engage in discovery in accordance with standard discovery procedures. If the Court retains proposed Rule 92(e), the phrase "[a]lthough this Rule does not ordinarily apply to deficiency cases . . ." is unnecessary and could lead to confusion. Instead of this language, we suggest that the Court detail the types of cases to which this rule applies; namely, collection review proceedings, innocent spouse cases, whistleblower actions, interest abatement claims, and potentially other cases.[18] This will be especially helpful for *pro se* petitioners who are generally not well-versed in these issues and may need direction as to whether their case requires certification of the administrative record. To that end, if the Court does not eliminate proposed Rule 92(e), we recommend that it advise petitioners of this requirement in the Court's preliminary correspondence to petitioners at the outset of their case.

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[17] *Cubic Applications, Inc. v. United States*, 37 Fed. Cl. 339, 342 (1977) (citing *Camp v. Pitts*, 411 U.S. 138, 142 (1973)).

[18] The Court has "left for another day" the scope and standard of review to be applied in passport revocation cases commenced under section 7345(e). *See Rowen v. Commissioner*, 156 T.C. 101, 106 (2021). It is appropriate for the Court's rules to clearly articulate the types of cases to which the administrative record rule applies.

E. Rule 121: Summary Judgment

1. Review Solely Based on Administrative Record

Proposed Rule 121(j) provides that for cases in which judicial review is solely based on the administrative record, the requirements that a moving party must show that there is no genuine issue of material fact (Rule 121(a)(2)) and that a moving party must prove its assertion by admissible evidence and/or declarations do not apply. Rather, proposed Rule 121(j) provides that any such motion or response in opposition should include a statement of facts with citations to the administrative record. Finally, proposed Rule 121(j) references proposed Rule 92 for procedures relating to the identification, certification, and filing of the administrative record. The explanation for the rule cites *Lissack v. Commissioner*,[19] in which the Court notes that the summary judgment standard is not well-suited to cases in which the standard of review is abuse of discretion, for which the scope of review is typically limited to the administrative record.[20]

We believe that proposed Rule 121(j) requires clarification with respect to two situations. First, we believe that proposed Rule 121(j) should clarify how and whether it will apply in the context of supplements to the administrative record. Petitioners in cases for which the scope of review is limited to the administrative record may, in certain circumstances, supplement the record in accordance with procedures set forth in proposed Rule 92(b).[21] The parties may not yet have resolved the final form of the administrative record when a motion for summary judgment is filed. Alternatively, the petitioner may only realize the need to supplement the administrative record when it receives the Service's motion for summary judgment. In such cases, it seems appropriate for the proposed Rule to permit the response to include "a statement of facts with references to the administrative record or proposed supplements to the administrative record requested pursuant to Rule 92(b)."

Second, we believe that proposed Rule 121(j) should clarify whether a movant must show that there is no genuine issue of material fact in cases reviewed under the *de novo* standard but in which the scope of review is possibly but not necessarily limited to the administrative record. For example, in the Taxpayer First Act,[22] Congress enacted section 6015(e)(7), which provides that innocent spouse cases are reviewed *de novo* by the Tax Court and that the scope of review is limited to: (1) the administrative record, and (2) any newly undiscovered or previously unavailable evidence. At the time that one party files a motion for summary judgment, it may not be known whether the other party

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[19] 157 T.C. 63 (2021).

[20] *See also Stuttering Found. of Am. v. Springer*, 498 F. Supp. 2d 203, 207 (D.D.C. 2007) (explaining why the general standard of review set forth in FED. R. CIV. P. 56 is not always apt in the context of reviews of final agency action under the APA).

[21] *See also* section 6015(e)(7) (allowing the introduction of newly discovered or previously unavailable evidence). Supplements to the administrative record may create a genuine issue of material fact.

[22] Pub. L. 116-25, § 1203(a)(1), 133 Stat. 981 (July 1, 2019).

may seek to introduce newly discovered or previously unavailable evidence. If the other party does not seek to evidence from outside the record, the Court's review would be limited to the administrative records. Accordingly, we suggest that the first clause of the first sentence of proposed Rule 121(j) be revised to provide: "In cases in which the scope of judicial review is by statute based solely on the administrative record . . . ." This would clarify that cases subject to section 6015(e)(7) do not fall within proposed Rule 121(j), irrespective of whether petitioner has sought to introduce any newly discovered or previously unavailable evidence at the time that a summary judgment motion is filed.

2. Partial Summary Judgment

Rule 121 has been modified to conform further with Rule 56 of the Federal Rules of Civil Procedures. The proposed Rule continues the practice of allowing motions for partial summary judgment. However, the Court may wish to clarify the scope of proposed Rule 121(a)(1) in cases where partial summary judgment is sought for a narrow legal issue that is only part of the legal issues in controversy. We recommend that Rule 121(a)(2) be clarified that the assessment of the facts in dispute should only be considered with respect to the issue for which relief is sought. Accordingly, we propose adding the following sentence to proposed Rule 121(a)(2): "The Court shall grant partial summary judgement on that part of the legal issues in controversy if the movant shows that there is no genuine dispute as to any material fact pertaining to the specific issue for which partial summary judgment is sought."

F. Rule 147: Subpoenas

1. Requirement of Deposition, Hearing, or Trial for Subpoena Duces Tecum

Proposed Rule 147(a)(1)(B) provides that any subpoena requesting the production of information must also require attendance at a deposition, hearing, or trial. The proposed Rule appears to have developed from the Court's recently adopted procedures, in Pre-Trial Orders, to enable a subpoenas duces tecum to a third-party witness to be returned prior to the start of the trial session on which a case is set for trial. This procedure has proved helpful in enabling the parties to obtain documentation from a third-party witness in sufficient time to determine its value for the case, and perhaps to be able to stipulate to the documents, thereby no longer requiring the witness to be called. While this proposed rule deviates from FED. R. CIV. P. 45, which provides that a subpoena requesting information may be separate from a subpoena commanding attendance at a deposition, hearing, or trial, the unique nature of Tax Court litigation may commend such a distinction. However, proposed Rule 147 requires that a party serving a subpoena provide notice of the subpoena to all other parties before issuing it, which we believe is problematic, as identifying witnesses is subject to the work-product privilege, and may provide the opposing party an indication of how the requesting party is preparing the case for trial. As an alternative, an approach similar to that provided in FED. R. CIV. P. 45 could be adopted by the Court, which provides that a party may move for an order compelling production or inspection, thereby making the requirement that a subpoena also mandate attendance at a deposition, hearing, or trial unnecessary. In some

instances, the Tax Court's process of setting subpoena hearings has proven to be inefficient, requiring the expenditure of unnecessary resources by the parties. Since the parties must move the Court for a subpoena hearing if the information is needed in advance of trial, the recipients of a subpoena generally produce the information prior to the subpoena hearing, rendering the subpoena hearing unnecessary. If a hearing on a subpoena is necessary, it should be set upon the filing of a motion to quash or modify a subpoena, or upon a motion to compel production.

2. Reasonable Time to Comply

Proposed Rule 147(d)(3)(A)(i) provides that the Court must quash or modify a subpoena that fails to allow a reasonable time to comply, but it does not specify a minimum time that will be considered reasonable. Proposed Rule 147(d)(2)(B) provides that the recipient of a subpoena must object within 15 days after the subpoena is served, or within the time specified for compliance, if earlier. We think that requiring the recipient of a subpoena to file an objection with the Court within any time that is less than 15 days from the date of service of the subpoena places an unreasonable burden on recipients, absent exceptional circumstances. Rather than rest the burden on recipients of subpoenas that may not be represented by someone admitted to practice before the Court (or represented at all), we suggest that the Rule be revised to specify that the time and place of attendance or production of information must not be less than 15 days from the date of service unless the serving party first seeks leave from the Court and provides a showing of exceptional circumstances justifying a shorter response period.

3. Suspend Subpoena Obligations While Motion to Quash or Modify is Pending

Proposed Rule 147(d)(3) provides that upon motion, the Court must quash or modify a subpoena under certain scenarios. However, it does not specify whether the recipient of subpoena is excused from complying with the subpoena while such motion is pending. Rather than require the recipient of a subpoena file objections to the subpoena that incorporate the reasons contained in the pending motion to quash or modify a subpoena, we suggest that the Rule be revised to specify that, upon the filing of a motion to quash or modify, the recipient's obligation to respond to the subpoena is suspended until the Court rules on the motion to quash or modify. The Rule should also be revised to require that any motion to quash or modify a subpoena by a party be served on the recipient of the subpoena.

G. Proposed New Rule 152: Brief of an Amicus Curiae

The Tax Court has permitted briefs by amicus curiae in the past, often looking to the standards set forth in Supreme Court Rule 29, FED. R. APP. P. 29, and local appellate court rules to determine whether such a brief will provide information and assistance to

the Court beyond that provided by the parties to the litigation.[23] As expounded in the Explanation to proposed Rule 152 in the Release, the Rule is drawn from FED. R. APP. P. 29 and Rule 7(o) of the local rules of the U.S. District Court for the District of Columbia.

The Section commends the Tax Court for proposed Rule 152 and believes this is an important development that will benefit taxpayers, the Commissioner of Internal Revenue, and the Court. Amicus briefs, which are more common at the appellate and Supreme Court levels, often can provide important information to the courts beyond that provided by the litigating parties. This can take many forms, from ensuring that relevant matters are brought to the court's attention to providing a different perspective on the impact of the issue presented. This is extremely important in tax cases, and in particular the Tax Court, given that the Court has nationwide jurisdiction, travels to each of the 50 states to conduct trials in various designated places of trial, and seeks to develop a uniform body of law to serve in the disposition of future tax cases. Given the enormous impact that Tax Court opinions can have on the public as a whole, it is vitally important that there be a procedure in place to ensure for "friend of the court" briefs.

The Section has grouped its comments on proposed Rule 152 into three categories: (1) Consent/Non-Consent to File Amicus Brief; (2) Length/Timing of Amicus Brief; and (3) Awareness/Need for Participation by Amicus Curiae.

1. Consent/Non-Consent to File Amicus Brief

Proposed Rule 152(a) provides that an amicus brief is permitted when directed by the Tax Court or if leave is given to an amicus curiae. Proposed Rule 152(g) states that any party may file any opposition to a motion for leave, concisely stating the reasons for such opposition, within 14 days after service of the motion or as ordered by the Court.

Proposed Rule 152 does not permit the filing of an amicus brief without the leave of the Court even in cases where both the taxpayer and the Service consent to the filing. The absence of provisions allowing for an amicus filing upon the parties' consent is a departure from Supreme Court Rule 37(a) and FED. R. APP. P. 29(a)(2), both of which permit the filing of an amicus brief (without need for leave of the court) if written consent of all parties has been provided.[24]

The Section recommends that the Tax Court adopt the position in Supreme Court Rule 37(a) and FED. R. APP. P. 29(a)(2), thereby avoiding the need for an amicus curiae to file a motion for leave if the taxpayer and the Commissioner (as well as any other

[23] *See, e.g.*, *Trump Village Section 3, Inc. v. Commissioner*, T.C. Memo. 1995-281; *Erwin v. Commissioner*, T.C. Memo. 1986-474.

[24] *But see* FED. R. APP. P. 29(b)(2) (providing that an amicus curiae, other than the United States or its officer or agency or state, may file an amicus brief during consideration of whether to grant rehearing only by leave of the court).

parties to the case) consent to the filing of the amicus brief.[25] The Section further recommends that, consistent with FED. R. APP. P. 29(a)(2), proposed Rule 152 provide that it is sufficient to obtain the parties' oral consent and to state in the amicus brief that all parties have consented.[26] These conforming revisions would eliminate the need for the Court's involvement where the parties agree to the filing of amicus brief, thus promoting judicial economy and preserving judicial resources.

It is in the best interests of taxpayers, the Service, and the Tax Court to have the benefit of amicus curiae for issues that impact more than just the individual petitioner. Consistent with the practice of the Department of Justice Tax Division, the Section hopes that the Service will embrace the views of amicus curiae in such situations and be liberal in providing consent to the filing of amicus briefs.

The Section recognizes that in some cases the parties may have legitimate reasons for opposing the filing of an amicus brief. Proposed Rule 152(g) gives "any party" the right to file an opposition to a motion for leave to file an amicus brief. The only qualifications on the right to object is that the party must do so timely (or with leave of the Court) and must "concisely state the reasons for such opposition" in their objection.

While the Section does not suggest curtailing the right of parties to object, the Section does recommend that proposed Rule 152 provide additional parameters for evaluating when objections are warranted. As written, proposed Rule 152(g) would presumably give intervening parties the right to object to the filing of amicus briefs. Particularly in "innocent spouse" cases,[27] or in cases where acrimony has grown between the litigants, parties may be inclined to object to the filings of amicus briefs for personal rather than jurisprudentially relevant reasons. While blatantly personal objections may be easy for the Court to deny, others may be cloaked in seemingly reasonable concerns. In either event, the Court will need to address the objection, consuming judicial resources.

The Section recommends that proposed Rule 152(g) require that any objection specifically address why the party believes the administration of tax laws would be hindered by allowing the filing of an amicus brief. The rationale for filing an amicus brief involves the interest of persons that would be affected by a decision beyond just the parties in the case. The Section's recommendation dovetails with the Congressional

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[25] The Supreme Court has proposed amending its Rule 37 to remove any requirement to obtain consent or file a motion for leave before submitting an amicus brief. *See* Supreme Court, *Proposed Revisions to the Rules of the Supreme Court of the United States, March 2022, Redline/Strikeout Version,* at 6–9, https://www.supremecourt.gov/filingandrules/2021_Proposed_Rules_Changes-March_2022-redline_strikeout_version.pdf (last visited April 26, 2022).

[26] *See* FED. R. APP. P. 29, Committee Notes on Rules—1998 Amendment (providing that it is sometimes difficult to obtain all written consents).

[27] *See* I.R.C. § 6015; Rule 325.

intent for determining whether an "S-Case" designation be removed, which addresses concerns similar to those of a party filing an amicus brief.[28]

The Section also recommends that proposed Rule 152(g) provide a rebuttable presumption that amicus briefs filed on behalf of *pro se* parties are justified. This would accord with the general practice of the Federal Court of Appeals in determining whether to allow amicus briefs.[29]

The Section's proposed changes will assist the Tax Court in efficiently and timely responding to proposed Rule 152(g) objections, while also potentially cutting off unreasonable objections from ever being filed. This is especially important given the tight timelines imposed by proposed Rule 152.

2. Length/Timing of Amicus Briefs

Proposed Rule 152(d) provides that an amicus brief may not be more than 25 pages, excluding certain materials, unless the Tax Court permits otherwise. Because the Tax Court, unlike appellate courts, does not automatically impose page or word limits, the 25-page limit seems reasonable to the Section.

In some cases, it might be appropriate for an amicus brief to exceed the page limit requirement. Proposed Rule 152 does not address how an amicus curiae should request permission to exceed the page limit, which raises questions as to when and how such a request should be made. For example, should an amicus curiae request an enlargement of the page limit in its motion for leave and attach the longer brief to its motion, as required by proposed Rule 152(b)? If the motion for leave is granted but the request for the page enlargement is denied, how will the Court deal with the longer brief? Will the amicus curiae be given the opportunity to re-file its brief within a specified time period or will the Court remove any pages in excess of the 25-page limit? Consistent with Rule 50, must the amicus curiae ask whether the parties consent to the page enlargement? If both parties consent, should the Court automatically allow the enlargement? The Section believes that it would be beneficial to taxpayers and the Service for the Court to provide guidance on how to request a page enlargement for amicus curiae briefs.

Proposed Rule 152(e) provides that an amicus curiae must file a motion for leave to file an amicus brief no later than 14 days after the first brief of the party being supported (or 14 days after the first brief is filed if no party is being supported). The Section commends the Tax Court for providing a period longer than the 7-day period

[28] *See* H.R. Rep. No. 95-1800, at 277–78 (1978) (Conf. Rep.) (providing that removal of a "small case" designation may be warranted if "the administration of the tax laws would be better served," or where the case may provide a precedent for a substantial number of other cases, among other reasons).

[29] *See* Fed. Ct. App. Manual § 32:14 (7th ed.).

contained in the Federal Rules of Appellate Procedure.[30] However, the Section believes that the Court should be liberal in granting leave for later filing.

Unlike cases at the appellate level, the public is often not aware of issues in pending Tax Court cases and the issue involved. Thus, situations often arise where other taxpayers or potential amici (*e.g.*, trade organizations, academic clinics) are not aware of an issue of interest until after the parties have filed their briefs. Accordingly, the Section believes it would be beneficial if the Court were to add the following additional sentence, consistent with the standard for amended pleadings in Rule 41, at the end of proposed Rule 152(e): "Leave shall be freely given when justice so requires."

3. Awareness/Need for Participation by Amicus Curiae

Proposed Rule 152(a) provides that either the "Court may direct an amicus curiae to file" or on motion "an amicus curiae may file" a brief with the Court. Accordingly, proposed Rule 152(a) contemplates two different ways an amicus brief may come before the Tax Court: (1) through the amicus curiae's independent awareness of the case, and (2) through the Tax Court's direct notification to the amicus curiae.

Obvious, if implicit, pre-condition for filing an amicus brief is the amicus curiae's awareness of the relevant issues of the case and the briefing schedule. Courts have taken various approaches towards raising public awareness of cases that may be appropriate for amicus briefs – for example, the United States Court of Appeals for the Ninth Circuit lists "cases of interest" on its webpage.[31] Though discontinued with the adoption of the "DAWSON" operating system, the Tax Court historically posted "designated orders" to its website, bringing public awareness to notable orders and cases, some of which were supported later in the litigation with the filing of amicus briefs.

The Section is particularly concerned about the role of *pro se* petitioners in developing tax law when the issues would benefit from thorough briefing. Because of the large number of litigants who appear before the Tax Court *pro se*, and given that *pro se* litigation can result in precedential Tax Court decisions that apply nationwide, a notification system for potential amicus briefs is especially prudent where *pro se* parties are involved. For such a system to serve its intended purpose, the notifications would need to provide sufficient information on the issues at play in the case, as well as the scheduled briefing dates.

The Section recommends that the Tax Court publish online as designated (or otherwise easily identifiable) orders those cases of interest that: (1) involve *pro se* petitioners; and (2) are likely to involve or would benefit from further briefing on the issues. The decision to designate would remain in the discretion of the presiding Judge. However, the Section strongly recommends that the Chief Judge set in place procedures

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[30] FED. R. APP. P. 29(a)(6).

[31] United States Court of the Ninth Circuit, https://www.ca9.uscourts.gov/ (last visited April 26, 2022).

to ensure that prior notification and the opportunity to file amicus briefs is available before any precedential Tax Court opinion is issued involving *pro se* petitioners.

H. Rule 210(b)(5): Definition of "Exempt Organization"

Pursuant to section 7428 of the Code, an organization that has received a determination from the Service with respect to its initial or continuing qualification as an organization described in section 501(c) and exempt from tax under section 501(a) may petition the Tax Court, the United States Court of Federal Claims, or the district court of the United States for the District of Columbia for a declaratory judgment with respect to such initial or continuing qualification. Prior to 2015, a declaratory judgment action was available with respect to initial classification as an organization described in section 501(c)(3) but not with respect to initial classification as an organization described in another subsection of section 501(c). In 2015, as part of the PATH Act, Congress amended section 7428 to add section 7428(a)(1)(E) which makes a declaratory judgment action available "with respect to the initial qualification or continuing qualification of an organization as an organization described in section 501(c) (other than paragraph (3)) or 501(d) and exempt from tax under section 501(a)."[32]

The current rules of the Tax Court anticipate declaratory judgment actions only from organizations seeking initial or continuing qualification under section 501(c)(3). Rule 210(a) provides that Title XXI of the Tax Court Rules applies to declaratory judgment actions including actions relating to "the initial or continuing qualification of certain exempt organizations or the initial or continuing classification of certain private foundations." Rule 210(b)(11)(E) defines an "exempt organization action" as "a declaratory judgment action provided for in Code section 7428 relating to the initial or continuing qualification of an organization as an exempt organization, or relating to the initial or continuing classification of an organization as a private foundation or a private operating foundation." Rule 210(b)(8) defines an organization as "any organization whose qualification as an exempt organization, or whose classification as a private foundation or a private operating foundation, is in issue." Rule 210(b)(5) defines an exempt organization as "an organization described in Code section 501(c)(3) which is exempt from tax under Code section 501(a) or is an organization described in Code section 170(c)(2)." Rule 211(g) describes the petition to be filed to initiate an exempt organization action. Thus, the rules do not currently address the petition to be filed to initiate a declaratory judgment action with respect to the initial or continuing classification of an organization as an exempt organization under any subsection of section 501(c) other than 501(c)(3) as such an action is not an "exempt organization action" under the current definitions in the rules.

The proposed amendments to the Tax Court rules would amend Rule 210(b)(5) only by changing "which" to "that" and otherwise leave the definition of exempt organization referring to organizations that are described in section 501(c)(3) or section

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[32] Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, 129 Stat. 2242, 3040, division Q, § 406.

170(c)(2). We suggest that the definition of an "exempt organization" in Rule 210(b)(5) be amended to refer to "an organization described in Code section 501(c) or 501(d) and exempt from tax under Code section 501(a) or an organization described in Code section 170(c)(2)." An "exempt organization action," as defined in Rule 210(b)(11)(E), would then also cover a declaratory judgment action authorized under section 7428(a)(1)(E).