



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

OFFICE OF THE CHIEF COUNSEL

May 24, 2022

Via email (Rules@ustaxcourt.gov)

Stephanie A. Servoss
Clerk of the Court
United States Tax Court
400 Second Street, NW, Room 111
Washington, DC 20217

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

Dear Ms. Servoss:

On behalf of the IRS Office of Chief Counsel, thank you for the opportunity to comment on the proposed amendments to the Tax Court Rules of Practice and Procedure, announced by press release dated March 23, 2022. The proposed amendments include three new rules – Rule 63, Intervention; Rule 92, Identification and Certification of Administrative Record in Certain Actions; and Rule 152, Brief of an Amicus Curiae. We applaud the Court’s efforts to simplify and modernize the Rules and to conform the Rules more closely to the Federal Rules of Civil Procedure where appropriate. Our comments on some of the specific proposals follow.

Rule 10. Name, Office, and Sessions

Proposed amended Rule 10(d) contains a reference to “legal holidays.” We recommend adding a cross-reference to the definition of that term in Rule 25.

Rule 21. Service of Papers

Regarding proposed amended Rule 21(a), we recommend that the proposed amended Rule require service on “every party and other person involved in the matter” (instead of “every party or other person involved in the matter”).

We identified the following typographical error in amended Rule 21(b)(1)(B): “Unless a paper is served through the Court’s electronic filing ~~and~~ and case management system....”

Proposed amended Rule 21(b)(2)(B) provides in pertinent part that a paper is served by “Mailing it to a party or a party’s counsel at the person’s last known address.” The address on record with the Court may be different than the last known address as that term is described in Treas. Reg. § 301.6212-2(a). Because respondent generally relies on the address in the Court’s records as the proper address for service, we recommend that the Court revise the proposed rule to require service at the party’s or party’s counsel’s address of record instead of the last known address.

Rule 34. Petition

Proposed amended Rule 34(b)(2) states that “A copy of the notice of deficiency or notice of liability must be attached to the petition.” We recommend that if a notice is not attached to the petition, it should be deemed imperfect, and that the Court order that an amended petition or amendment to petition be filed within 60 days to correct the omission. Respondent would then have 60 days from the filing of the amendment to answer the petition, as amended, or to answer the amendment to petition. Absent compliance with the Court’s order to perfect the petition, the Court should consider dismissing the petition for failure to prosecute.

Rule 36. Answer

Regarding proposed amended Rule 36(b), the Court proposes to add the following sentence:

If the petition does not include a copy of the notice of deficiency or other relevant jurisdictional document, the answer must include a copy of the notice of deficiency or other relevant jurisdictional document or state that no such document was issued.

It is axiomatic that the party invoking the Court’s jurisdiction bears the burden of proving the facts needed to establish the Court’s jurisdiction. David Dung Le, M.D., Inc. v. Commissioner, 114 T.C. 268, 270 (2000), aff’d, 22 Fed. Appx. 837 (9th Cir. 2001); Mathews v. Commissioner, T.C. Memo. 2021-85. While respondent is nevertheless the party who often produces the relevant document supporting the Court’s jurisdiction, in many cases we will be unable to comply with the directive to supply a full copy of the notice of deficiency or other relevant jurisdictional document, or a statement that the document does not exist, at the time respondent files the answer. Notices of deficiency and notices of determination are issued by at least eight different units within the IRS, all of which use different procedures to create, issue, and store notices. Counsel regularly experiences significant delays in obtaining documents from various IRS Service Centers and other IRS units after our requests for these documents are made. In order to avoid the necessity of filing motions for extensions of time to file an answer or motions for leave to file an answer out of time in order to comply with this requirement, we propose the following sentence be added after the last sentence of proposed amended Rule 36(b): “If the jurisdictional document is not available at the time of answer, the jurisdictional document may be supplied when it becomes available by filing an amendment to the answer without leave of the Court.”

Rule 70. General Provisions

Proposed amended Rule 70(d)(2) adopts the language of Fed. R. Civ. P. 26(b)(5)(B) to cover the situation where a party discovers that information produced in response to a discovery request is subject to a claim of privilege or protection as trial-preparation material. These Rules provide that the *receiving* party may promptly present the information under seal to the Court for a determination of the claim. We recommend that the proposed amended Rule indicate that *either* party can raise whether the disclosed information is privileged or protected work product with

the Court and that such issue can be raised in any appropriate manner and not just under seal to the Court.

Rule 74. Depositions for Discovery Purposes

Rule 74(b)(2) requires that the notice of deposition set forth the name of the officer before whom the deposition is to be taken. It has been our experience when retaining a court reporting company that the company will not immediately assign a particular court reporter and, as a result, the requirement cannot be met. We recommend revising the Rule to require the name of the court reporting company and court reporter, if available.

Rule 81. Depositions in Pending Case

Rule 81(b)(1)(G) requires that an application to take a deposition in a pending case name the officer before whom the deposition is to be taken. As in our comment to Rule 74(b)(2) above, we recommend revising the Rule to require the name of the court reporting company and court reporter, if available. Proposed amended Rule 81(b)(2) provides that the application to take a deposition (and objections thereto) and a conformed copy together with an additional conformed copy for each additional docket number must be filed with the Clerk. The filing of the application with a conformed copy appears to envision the paper filing of these documents with the Court. We recommend that the filing requirements in Rule 81(b)(2) be revised to conform to the revised filing requirements in the proposed amendment to Rule 23(b) concerning the electronic filing of documents with the Court.

Rule 92. Identification and Certification of Administrative Record in Certain Actions

The scope of the Court's review of the IRS's determinations has been the subject of frequent disputes in collection, whistleblower, spousal relief, and other matters. We believe that adoption of the rule of procedure and uniform process in proposed Rule 92 governing the submission of administrative records to the Court in appropriate cases will assist parties to more fully stipulate and narrow the issues in need of resolution.

Proposed Rule 92(a) requires the administrative record to be filed within 30 days of a notice setting case for trial regardless of whether the record is stipulated by the parties or filed unilaterally by the Commissioner with a certification as to its genuineness. Rule 217(b)(1), on the other hand, requires filing of the administrative record within 30 days of service of the answer if it is stipulated and between 30 and 45 days if it is certified. Rule 217 recognizes the possibility that the parties may attempt to stipulate to the record but fail to do so with insufficient time remaining within a 30-day period to obtain a certification as to the genuineness of the record. Similarly, we recommend that proposed Rule 92 provide a period of 60 days for the Commissioner to file a certified record where the parties have been unable to file a stipulated record within the 30-day period specified in the proposed Rule.

In proposed Rule 92(c), we recommend including "transcripts and other information maintained electronically by Internal Revenue Service" in defining the content of an administrative record.

We note that with respect to disputes concerning spousal relief, section 6015(e)(7) provides that a determination made under section 6015 is reviewed de novo by the Court based upon “(A) the administrative record established at the time of the determination, and (B) any additional newly discovered or previously unavailable evidence.” Notwithstanding this mandate, the Court must sometimes review a claim for spousal relief without the assistance of an administrative record. For instance, taxpayers may raise section 6015 for the first time in a petition as an affirmative defense to the determination of a deficiency. Alternatively, a taxpayer may petition the Court under section 6015(e)(1)(A)(i)(II) if the IRS has not issued a determination within six months of the request for relief. In such cases, because the taxpayer’s claim has not been the subject of a determination by the IRS, there will be no administrative record for the parties to stipulate and the Court to review pursuant to section 6015(e)(7). We request that the Court acknowledge that proposed Rule 92 does not apply in such cases.

We note that while the proposed Rule appears generally limited to those administrative records related to whistleblower actions, collection review actions, and spousal relief disputes, paragraph (e) opens the door to application of the new rule to administrative records beyond those cases. Published guidance, such as Treasury regulations or Internal Revenue Bulletin guidance, has been increasingly subject to challenge under the Administrative Procedure Act (APA), 5 U.S.C. § 551 et seq., in the Tax Court as part of deficiency and other proceedings. The content of an administrative record for APA review has been the subject of case law in the Federal courts, and it is important that a consistent definition be applied so agencies such as the IRS can maintain appropriate and complete records for such reviews. In contrast to the materials contemplated as part of the administrative record by paragraph (c) of proposed Rule 92, the administrative record for purposes of review of a regulation or other guidance under the APA is generally limited to the materials considered by the IRS in promulgating the rule. This may include public comments submitted to the IRS and other publicly available documents such as law review articles, statutes and legislative histories, and other regulations considered in promulgating a rule. The administrative record for purposes of the APA does not include, for instance, “all materials prepared by Internal Revenue Service personnel” as part of the guidance process. It is important to limit the contents of an administrative record for such purposes in order to avoid including material in the record that is irrelevant to APA review of IRS guidance or material that is predecisional and deliberative in nature and subject to a claim of governmental privilege. We are concerned that there is ambiguity of paragraph (e) as to whether the proposed Rule may apply to cases involving an APA challenge to IRS guidance or may permit taxpayers to seek discovery beyond the administrative record that is certified by the IRS. To avoid these potentially burdensome disputes, we request the Court modify the language in paragraph (e) to make clear that proposed Rule 92 does not apply in cases in which a taxpayer seeks to challenge the validity of a regulation or other guidance pursuant to the APA.

We note that with respect to whistleblower claims, the administrative record is already defined by regulation and that litigation of such claims is typically resolved by motions practice and rarely proceeds to trial. Accordingly, we recommend that (1) the Court reference in this proposed Rule the definition of the “administrative record” set forth in Treas. Reg. § 301.7623-3(e)(2); and (2) that the time for filing the record in such cases be measured from the time the pleadings are closed rather than the time the case is set for trial. We propose that the Rule

provide that the record in such cases is required to be filed within 90 days after the answer is filed.

We also recommend clarifying that the administrative record in a section 7345 passport case should only consist of the taxpayer's transcript of account that reflects whether the petitioner has a seriously delinquent tax debt as defined in section 7345(b).

Lastly, we recommend adding section 6404(h) cases to paragraph (e) or a new subsection. Like deficiency cases, section 6404(h) cases are not normally based on the administrative record, but the Court should have the option to direct the parties to follow these procedures in cases where there has been a notice of determination denying interest abatement relief.

Rule 147. Subpoenas

Proposed amended Rule 147(e)(2)(B) adopts the language of Fed. R. Civ. P. 45(e)(2)(B) to cover the situation where a party discovers that information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material. As in our comment to Rule 70(d)(2) above, we recommend that the proposed amended Rule provide that *either* party can raise whether the disclosed information is privileged or protected work product with the Court and that such issue can be raised in any appropriate manner and not just under seal to the Court.

Proposed amended Rule 147 makes no provision for subpoenas for remote proceedings. The procedures posted to the Court's website, revised December 10, 2020, have worked well for remote proceedings and we believe they would work equally well for in-person proceedings. In particular, the procedures for requesting a document subpoena hearing promote early compliance with subpoenas and the exchange of information in time to benefit the stipulation process and enhance trial preparation. Accordingly, we recommend expanding the proposed amended Rule to include these procedures for both remote and in-person proceedings.

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We appreciate this opportunity to comment on the proposed amendments to the Court's Rules of Practice and Procedure. Please do not hesitate to contact me if you desire any additional information or wish to discuss our comments and recommendations in further detail.

Sincerely,

Drita Tonuzi
Deputy Chief Counsel (Operations)

By:

Richard G. Goldman
Deputy Associate Chief Counsel
(Procedure and Administration)

cc: Mitchell Horowitz
Chair, Court Practice & Procedure Committee
ABA Section of Taxation
Buchanan Ingersoll & Rooney PC
401 E. Jackson Street, Suite 2400
Tampa, FL 33602-5236
mitchell.horowitz@bipc.com