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May 4, 2016

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

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

Dear Chief Judge Thornton:

Enclosed please find comments on the interim and proposed amendments to the Tax Court Rules of Practice and Procedure relating to the Bipartisan Budget Act of 2015, the Fixing America's Surface Transportation Act, and the Protecting Americans from Tax Hikes Act of 2015 ("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: Hon. William J. Wilkins, Chief Counsel, Internal Revenue Service

**AMERICAN BAR ASSOCIATION  
SECTION OF TAXATION**

**COMMENTS ON PROPOSED AMENDMENTS TO THE TAX  
COURT RULES OF PRACTICE AND PROCEDURE RELATING TO  
THE BIPARTISAN BUDGET ACT OF 2015, THE FIXING  
AMERICA'S SURFACE TRANSPORTATION ACT, AND THE  
PROTECTING AMERICANS FROM TAX HIKES ACT OF 2015**

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. Substantive contributions were made by Sean Akins, Erica Brady, Jeremiah Coder, and Mitchell Horowitz. The Comments were reviewed by Christopher S. Rizek, the Section's incoming Council Director for CPP and a member of the Section's Committee on Government Relations; 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.

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Date:            May 4, 2016

## Executive Summary

On March 28, 2016, Chief Judge Michael B. Thornton announced by press release that the United States Tax Court had adopted interim amendments to its Rules of Practice and Procedure (the “Rules”), as well as proposed additional amendments. The interim and proposed amendments relate to the Bipartisan Budget Act of 2015 (the “BBA”);<sup>1</sup> the Fixing America’s Surface Transportation Act (the “FAST Act”);<sup>2</sup> and the Protecting Americans from Tax Hikes Act of 2015 (the “PATH Act”).<sup>3</sup> The Court invited the public to submit for consideration any comments regarding the proposed amendments. These comments are submitted in response to that invitation. The Section appreciates the opportunity to provide comments on how to improve practice before the Tax Court with regard to these proposals.

The Section’s comments can be summarized as:

- I. Rule 13. Jurisdiction: The Section supports the revision to Rule 13 as it is necessitated by section 424 of the PATH Act.
- II. Rule 143. Evidence: The Section generally supports the revision to Rule 280, as it is necessitated by section 425 of the PATH Act. The Section respectfully requests that the Court address the application of the rule set forth in *Golsen v. Commissioner*<sup>4</sup> to evidentiary issues in comments that the Court may make in adopting the changes to this rule.
- III. Title XXIV.A. Partnership Actions Under BBA Section 1101: The Section generally supports the addition of Title XXIV.A. The Section respectfully suggests that additional language be added to Rule 255.1(b) to clarify definitions used in proposed Title XXIV.A of the Rules; that additional language be added to proposed Rule 255.1(c) to clarify that the Tax Court does not have jurisdiction to hear an action after the rescission of final notice of partnership adjustment under section 6231(c);<sup>5</sup> that modifications to the language of proposed Rule 255.2 be made to make the requirements for a petition in a partnership action under BBA section 1101 more similar to the requirements of a petition as described in Rule 34; and that a rule be added that would be analogous to current Rule 250.
- IV. Title XXVII. Actions for Failure to Abate Interest: The Section generally supports the revisions to Rule 280 and 281, as they are necessitated by sections 421 and 422 of the PATH Act. The Section respectfully recommends that Rule 281(b)(2) be modified to include a requirement, that where a claim to abate interest has been filed with the Service, a copy of that claim be included with the Petition; that Rule 281 be modified to include language that would allow a judge discretion to excuse lapses in filing a complete petition

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<sup>1</sup> Pub. L. No. 114-74, 129 Stat. 584 (2015).

<sup>2</sup> Pub. L. No. 114-94, 129 Stat. 1312 (2015).

<sup>3</sup> Pub. L. No. 114-113, 129 Stat. 2242 (2015).

<sup>4</sup> 54 T.C. 742 (1970), *aff’d* 445 F.2d 895 (10th Cir. 1971).

<sup>5</sup> References to a “section” are to a section of the Internal Revenue Code of 1986, as amended (the “Code”), unless otherwise indicated.

petition, be further revised to make clear that the date of a Notice only needs to be included when a Notice has been issued.

- V. Title XXXIV. Certification and Failure to Reverse Certification Action With Respect to Passports: The Section generally supports the proposed rules relating to civil actions under section 7345. The Section suggests that the Court consider adding the notice required by section 7345(d) to the list of notices that a petitioner may dispute on Form 2 once that notice title becomes available.

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

### I. Rule 13. Jurisdiction.

Section 424 of the PATH Act amended sections 6015(e) and 6330(d) to provide that the period for filing a petition for review of a claim for spousal relief or a petition for review of a lien or levy action is suspended during the period that a bankruptcy filing under title 11 of the United States Code prevents a taxpayer from petitioning this Court and for 60 days thereafter. The amendments made by PATH Act section 424 apply to petitions filed under section 6015(e) or 6330 after December 18, 2015.

The Court amended Rule 13 on an interim basis to reflect the addition of sections 6015(e) and 6330(d)(2) as instances where the filing of a petition may be extended following the filing of a bankruptcy petition in determining the Court's jurisdiction. The Tax Court proposes to revise Rule 13 in a manner consistent with the interim changes to that rule. The Section supports this revision to Rule 13, as it is necessitated by section 424 of the PATH Act.

### II. Rule 143. Evidence.

Section 425 of the PATH Act amended section 7453 by striking language directing the Court to follow the rules of evidence “applicable in trials without a jury in the United States District Court of the District of Columbia” and replacing it with a directive that the Court shall follow the Federal Rules of Evidence. This amendment applies to proceedings commenced after December 18, 2015, and to the extent that it is just and practicable, to all proceedings pending on that date. In response, the Court on an interim basis deleted language in Rule 143 that referenced evidentiary rules applicable to trials without a jury in the United States District Court for the District of Columbia and replaced it with a sole reference to the Federal Rules of Evidence. The Tax Court proposes to revise Rule 143 in a manner consistent with the interim changes to that rule.

The Section supports this revision to Rule 143, as it is necessitated by section 425 of the PATH Act. As the Court considers adoption of a final amendment to Rule 143, the Section respectfully requests that the Court address its view on the application of the rule set forth in *Golsen v. Commissioner*<sup>6</sup> for evidentiary issues in comments that the Court may make in adopting the changes to this rule. The Section requests that the Court expressly address the application of *Golsen* to this rule so that petitioners know whether prior interpretations by the Tax Court of the Federal Rules of Evidence or interpretations by the appellate court to which the case would be appealed will control when the two are in conflict.

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<sup>6</sup>54 T.C. 742 (1970), *aff'd*, 445 F.2d 985 (10th Cir. 1971).

### III. Title XXIV.A. Partnership Actions Under BBA Section 1101.

This new Title XXIV.A is intended to cover situations in which a partnership elects, under section 1101(g)(4) of the BBA, to have the new partnership audit rules apply to a partnership return filed for a partnership taxable year beginning on a day from November 3, 2015 through December 31, 2017. The Section agrees with the Court's decision that there is no immediate need to provide the proposed amendments as interim amendments, as it is extremely unlikely that a petition will be filed under new Title XXIV.A for at least a few years, at the earliest.

The Section notes that proposed rules under new Title XXIV.A are designed to resemble the current rules in Title XXIV regarding partnership actions under TEFRA. The Section agrees that this approach enables practitioners to have a common frame of reference without the need to learn an entirely unfamiliar format for the proposed rules. The Section notes that the provisions in existing Title XXIV that will no longer have any applicability to partnership actions under BBA section 1101 have been eliminated from the proposed rules (i.e., Rules, 245 through 250, inclusive), and we approve of this decision.

With respect to the specific proposed rules, the Section has the following comments:

#### a. Rule 255.1. General

This proposed rule is substantially similar to current Rule 240. The Section generally agrees with the structure and format of this proposed rule. However, the Section respectfully suggests that additional language be added to clarify the definitions of additional terms that are used in Title XXIV.A. of the Rules. Unlike in partnership actions under TEFRA, section 6225 sets forth a regime by which an imputed underpayment is determined to be a liability of the partnership, subject to modification under section 6225(c). Therefore, the Section believes that the definitions under Rule 255.1(b) should be expanded as follows:

(5) An "imputed underpayment" has the meaning provided under Code sec. 6225.

(6) A "modification to an imputed underpayment" has the meaning provided under Code sec. 6225(c).

Further, the Section believes that Rule 255.1(c)(2) should be modified by adding "... which has not been rescinded in accordance with Code sec. 6231(c)." after the words "taxable year(s)." This would clarify that the Court does not have jurisdiction over a partnership action based on a notice of final partnership adjustment that has been rescinded in accordance with section 6231(c).

b. Rule 255.2. Commencement of Partnership Action.

This proposed rule is substantially similar to current Rule 241. The Section generally agrees with the structure and format of this proposed rule. The Section respectfully suggests several changes to the language of Rule 255.2.

As noted in the comments to proposed Rule 255.1, a partnership action under BBA section 1101 concerns the liability of the partnership for the imputed underpayment, which the Section believes should be incorporated into the format of the petition, similar to the requirements in Rule 34(b)(3). Accordingly, the Section suggests that proposed Rule 255.2(b)(5) be modified to read as follows:

(5) The amount of the imputed underpayment, determined by the Commissioner, the nature of the tax, the year or years or other periods for which the determination was made; and, if different from the Commissioner's determination, the approximate amount of the imputed underpayment in controversy, including any proposed modification(s) to the imputed underpayment that were not consented to by the Commissioner.

Similarly, proposed Rule 255.2(b)(6) should be modified to require the partnership to aver in the petition which specific modification(s) to the proposed underpayment were not consented to by the Commissioner, and proposed Rule 255.2(b)(7) should be modified to require the partnership to detail the facts supporting the allegations of error by the Commissioner in not consenting to modification(s) to the imputed underpayment.

The Section also notes that the flush language of current Rule 241(c) regarding claims for reasonable litigation or administrative costs has been eliminated from the analogous proposed rule, proposed Rule 255.2(b). The Section believes that the following language should be inserted in the proposed rule:

A claim for reasonable litigation or administrative costs shall not be included in the petition in a partnership action. For the requirements as to claims for reasonable litigation or administrative costs, see Rule 231.

The Section agrees that analogues to current Rule 241(d), (e), (f), and (g) are not required for proposed Rule 255.2.

c. Rule 255.3. Request for Place of Trial.

The proposed rule on request for place of trial is substantially similar to current Rule 242. The Section has no comment to the proposed rule.

d. Rule 255.4. Other Pleadings.

The proposed rule on other pleadings is substantially similar to current Rule 243. The Section has no comment to the proposed rule.

e. Rule 255.5. Joinder of Issues in Partnership Action.

The proposed rule on joinder of issue in partnership action is substantially similar to current Rule 244, but with the elimination of notice requirements that are no longer effective under BBA section 1101. The Section has no comment to the proposed rule.

f. Rule 255.6. Decisions.

The proposed rule on decisions is substantially similar to current Rule 251. The Section has no comment to the proposed Rule.

g. Addition of New Proposed Rule 255.7. Appointment and Removal of Partnership Representative.

As noted above, the Court eliminated from the proposed rules analogues to current Rules 245 through 250, inclusive. Current Rules 245, 246, 247, 248 and 249 were applicable to TEFRA actions, and are not required under BBA section 1101. However, the Section recommends that the Court consider adding a rule that would be analogous to current Rule 250, concerning the appointment and removal of the partnership representative. Section 6223(a) authorizes the Secretary to select a person to serve as the partnership representative whenever such a designation is not in effect, which is similar to section 6231(a)(7)'s authorization of the Secretary to appoint a tax matters partner where other means to do so are impractical. The Section does not believe that Congress intended the Secretary's authority to appoint partnership representatives to extend to cases pending in any court with jurisdiction over the partnership action because common sense would limit the Secretary's ability to appoint a partnership representative to circumstances similar to those when the Secretary is currently able to appoint a tax matters partner under TEFRA. Accordingly, the Court should add a new proposed Rule 255.7 that would be substantially similar to current Rule 250 regarding the appointment or removal of a partnership representative.

IV. Title XXVII. Actions for Failure to Abate Interest.

a. Rule 280. General.

Section 421 of the PATH Act amended section 6404(h) to provide that a taxpayer may petition the Court for an abatement of interest if the taxpayer files a claim for interest abatement with the Service and the Commissioner fails to issue a final determination on the claim within 180 days after the claim was filed. This amendment is applicable to claims for abatement of interest filed with the Service after December 18, 2015.

The Tax Court proposes to revise Rule 280 in a manner consistent with the interim changes to that rule. Specifically, the proposed revisions provide that a taxpayer may petition the Court for an abatement of interest if the taxpayer files a claim for



interest abatement with the Service, and the Commissioner fails to issue a final determination on the claim within 180 days after the claim was filed. The Section supports this revision to Rule 280, as it is necessitated by section 421 of the PATH Act, which amended Code section 6404(h) to allow a Petition to be filed in such circumstances.

b. Rule 281. Commencement of Action for Review of Failure to Abate Interest.

In addition to the statutory changes brought about to interest abatement review cases by section 421 of the PATH Act (as noted above in Rule 280), section 422 of the PATH Act amended section 7463(f) to permit a petitioner to elect “small” tax case status if the amount of the abatement sought does not exceed \$50,000. The Court, on an interim basis, amended Rule 281 to add further requirements to the content of a petition seeking review of an action taken under section 6404(h). The Tax Court proposes to revise Rule 281 in a manner consistent with the interim changes to that rule.

The Tax Court proposes to revise Rule 281(b)(2) to provide that a Petition for Review of Failure To Abate Interest Under Code Section 6404 must set forth “The date upon which the claim for abatement of interest, if any, was mailed to the Internal Revenue Service, and the office to which it was mailed.” The Section respectfully recommends that Rule 281(b)(2) be modified to include a requirement that where a claim to abate interest has been filed with the Service, that a copy of that claim be included with the Petition. Such a requirement would conform Rule 281(b)(2) to Proposed Rule 281(b)(4)(b), which requires the inclusion of a copy of the notice of determination, to the extent one has been issued; and would allow the Tax Court and the parties to more clearly ascertain whether the requisite 180 days under section 6404(h)(1)(A)(ii) has elapsed, thereby conferring jurisdiction on the Court.

Additionally, the Section is concerned that *pro se* petitioners might find themselves in a position of inadvertently failing to follow all of the requirements set forth in Rule 281 for a proper interest abatement review petition. Many petitioners lack a sophisticated understanding of tax documents and communications from the IRS; therefore, it is quite likely that petitioners without representation before the Court may not fully comprehend what factual allegations need to be put in a petition, as contemplated by the amended Rule 281. The Section recommends that the Court add language to Rule 281 that would permit a judge to use discretion to excuse lapses in filing a complete petition under this Rule.

The Tax Court also proposes to revise Rule 281(c), which provides that, for small tax cases arising under section 7463(f)(3), the content of a petition to review the Service’s failure to abate interest is set forth in Rules 170 through 175. In connection with this proposed change, the Tax Court also proposes to revise Form 2 to the Rules, which sets forth the form of a small tax case petition. The Section respectfully recommends that the proposed Form 2 be further revised to make clear, in enumerated Paragraph 2, that the date of a Notice need be included only to the extent that such a

Notice has been issued. As presently drafted, the Section believes that some petitioners, particularly *pro se* petitioners, may interpret the Form to require that a notice of determination be issued before a Petition may be filed. Inserting a short phrase, such as “If applicable,” at the beginning of enumerated Paragraph 2 may clarify that the issuance of a notice of determination is not necessarily a pre-requisite to petitioning the Court.

The Section supports the remaining proposed changes to Rule 281.

V. Title XXXIV. Certification and Failure to Reverse Certification Action With Respect to Passports.

The FAST Act added a new section 7345, Revocation or Denial of Passport in Case of Certain Tax Delinquencies, to the Code. Section 7345(a) provides that, if the Commissioner certifies that an individual has a “seriously delinquent tax debt,” the Secretary of the Treasury shall submit that certification to the Secretary of State for action to deny, revoke, or limit a passport as described in section 32101 of the FAST Act. Under new section 7345(c), the Commissioner shall notify the Secretary (who shall, in turn, notify the Secretary of State) if the Commissioner reverses the certification on the grounds that it was erroneous, the debt was fully satisfied, or the debt ceases to be a seriously delinquent tax debt because one of the exceptions in section 7345(b)(2) applies. Unless an exception applies, the Secretary of State shall not issue a passport to an individual who has been certified to have a seriously delinquent tax debt. If an individual has a passport, the Secretary of State may revoke that passport upon receiving the certification.

The Commissioner is required to provide an individual with contemporaneous notification of a certification under section 7345(a) or a reversal of a certification under section 7345(c). Section 7345(e)(1) allows a petitioner to file a civil action against the United States in either the Tax Court or a district court of the United States to determine whether the certification was erroneous or the Commissioner failed to reverse a certification. Section 7345(e)(2) provides that, if the court determines that the certification was erroneous, the court “may order the Secretary to notify the Secretary of State that such certification was erroneous.” Section 7345 is effective as of December 4, 2015.

On April 11, 2016, the Technical Corrections Act of 2016 was introduced as H.R. 4891 in the House of Representatives and as S. 2775 in the Senate. The Technical Corrections Act of 2016 would make two changes to section 7345, specifically to section 7345(e)(1) as follows: (1) it would clarify that any civil action shall be filed “against the Commissioner in the Tax Court,” not against the United States and (2) a sentence would be added providing that the first court to acquire jurisdiction over an action under section 7345(e) shall have sole jurisdiction.

The Section generally supports the proposed rules relating to civil actions under section 7345. Although the Service has not yet issued practices and procedures implementing section 7345, the Section suggests that the Court consider adding the

notice required by section 7345(d) to the list of notices that a petitioner may dispute on Form 2, the simplified form of a petition, once that notice title becomes available.

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