United States Tax Court

Washington, DC 20217

RULES OF PRACTICE AND PROCEDURE
UNITED STATES TAX COURT

DISCUSSION OF COMMENTS RECEIVED

On March 22, 2022, the U.S. Tax Court issued proposed amendments to the Tax Court Rules of Practice and Procedure. The Court subsequently received comments that can be viewed on the Court's website. After considering those comments, the Court made revisions to some of the proposed amendments and adopted final amendments, as summarized below.

Rule 1

The Court received no comments regarding the proposed amendments to Rule 1. The Court adopted the amendments to Rule 1 as published, with an additional stylistic amendment to paragraph (b) of Rule 1 to conform more closely to Rule 1 of the Federal Rules of Civil Procedure.

Rule 3

The Court received no comments regarding the proposed amendments to Rule 3. The Court removed the definition of "dispositive motion" and relettered the remaining paragraphs. The Court adopted the remaining amendments to Rule 3 as published.

Rule 10

In accordance with comments, paragraph (d) of Rule 10 is amended to include a cross-reference to the definition of "legal holiday" appearing in paragraph (a)(5) of Rule 25. The Court received no other comments; the Court adopted the remaining amendments to Rule 10 as published.

Rule 13

Although the Court did not propose amendments to Rule 13, commenters suggested that certain provisions of Rule 13 should be deleted given uncertainty regarding the effect of late-filed petitions on the Court's jurisdiction. Because the Court did not propose amendments to Rule 13, and there has been no opportunity for informed, broad-based comment, the Court is not amending Rule 13 at this time.

Rule 20

The Court received a comment suggesting that paragraph (d) of Rule 20 should be amended to state that the filing fee be paid "in conjunction with" the filing of the petition. The commenter suggested that the proposed language would serve as an acknowledgement that a petitioner is able to file a petition electronically and remit the filing fee separately through Pay.gov or by mailing a check to the Court. Although the Court offers alternative methods for petitioners to pay the filing fee, paragraph (d) of Rule 20 provides (and the Court expects) that petitioners will undertake to pay the filing fee at the time the petition is filed. No further amendment to paragraph (d) of Rule 20 is warranted. The Court has addressed the concern expressed in the comment by amending Form 2 (Petition) and the instructions accompanying Forms 1 and 2.

The Court amended paragraph (c) of Rule 20 to require a nongovernmental corporation that seeks to intervene to file a disclosure statement as described in paragraph (c).

The Court received no other comments regarding the proposed amendments to Rule 20 and adopted the remaining amendments as published.

Rule 21

The Court adopted two amendments to Rule 21 in response to comments. First, paragraph (a) of Rule 21 is amended to clarify that papers are required to be served on every party and other person involved in the matter. Second, paragraph (b) of Rule 21 is amended to provide that service is required to be made at the party's or party's counsel's address of record. The latter amendment is intended to eliminate any confusion that might arise under existing Rule 21, which provides for service at the party's or party's counsel's last known address. Additionally, the Court moved language from proposed paragraph (b)(3) into new paragraph (b)(4) (consolidated cases) and made conforming changes to the remaining subparagraphs of paragraph (b).

The Court otherwise adopted the remaining amendments as published.

Rule 23

The Court received no comments regarding the proposed amendments to Rule 23 and adopted the amendments as published, with some minor reorganization to paragraph (d)(1).

Rule 25

As previously noted, in response to comments, the Court amended paragraph (d) of Rule 10 to include a cross-reference to the definition of "legal holiday" set forth in paragraph (a)(5) of Rule 25.

The Court received a comment inquiring whether and how the availability of and access to the Court's electronic filing and case management system might impact questions regarding the physical inaccessibility of the Clerk's Office on the last day of a filing period. The Court's Rules of Practice and Procedure are not designed or intended to address every possible scenario. The Court will address any issues and disputes that might arise in connection with the application of new paragraph (a)(2) of Rule 25 through case law and similar guidance.

The Court adopted the amendments to Rule 25 as published.

Rule 26

The Court received no comments regarding the proposed amendments to Rule 26 and adopted the amendments as published, with some minor reorganization to paragraph (b).

Rule 27

The Court received comments suggesting that the Court should expand remote electronic access to its docket records, including those of entities, which may implicate privacy concerns different from records of individual taxpayers. Although the Court continues to evaluate options for increased remote access to its docket records, Rule 27 reflects the Court's current policy balancing the interest in protecting sensitive personal information against the public's interest in access to the Court's records. Despite the Court's efforts directing parties to protect sensitive personal information, in practice that type of information is routinely embedded in papers filed with the Court. This is true not only in cases involving self-represented parties, but also in cases involving parties represented by counsel. A survey of over 3,000 cases conducted by the Court in 2020 showed the problem to be widespread, affecting over 90 percent of the cases sampled.

The Court believes that additional steps to expand remote electronic access to the Court's docket records should be measured and take into account the types of personal sensitive information frequently present in those records. The Court's practice of limiting remote access to electronic files is similar to the treatment of Social-Security appeals and immigration cases under Rule 5.2(c) of the Federal Rules of Civil Procedure and is consistent with the protection of tax information filed with Federal Bankruptcy courts. For additional background on the Court's policies regarding remote electronic access to its docket records, see Note, 130 T.C. 395-401.

The Court adopted the amendments to Rule 27 as published, with additional stylistic amendments to paragraphs (a)(1), (b), and (d).

Rule 31

The Court received no comments regarding the proposed amendments to Rule 31 and adopted the amendments as published.

Rule 32

The Court received a comment suggesting that the Court should revise instructions accompanying certain Forms contained in the Appendix to the Rules of Practice and Procedure to more clearly reflect the provisions of paragraph (c) of Rule 32. The Court agrees and has amended the relevant instructions.

The Court adopted the amendments to Rule 32 as published.

Rule 33

The Court received no comments regarding the proposed amendments to Rule 33 and adopted the amendments as published.

Rule 34

The Court received a comment suggesting that a petition failing to comply with Rule 34(b)(2) should be deemed imperfect and that failure to perfect the petition should lead to dismissal for failure to prosecute. The Court's Rules of Practice and Procedure authorize the Court to dismiss a case in the event a petitioner fails to comply with a Court directive to perfect an otherwise imperfect petition. In this regard, no further amendment to Rule 34 is warranted.

Existing paragraph (b)(4) of Rule 34 is relettered as paragraph (f).

The Court otherwise adopted the amendments to Rule 34 as published.

Rule 35

The Court received no comments regarding the proposed amendments to Rule 35 and adopted the amendments as published, with an additional stylistic amendment to paragraph (e).

Rule 36

The Court received comments suggesting that the Commissioner should be obliged to review the administrative file before filing an answer. The Court observes that the pleading obligations imposed on the Commissioner in Rule 36, Answer, and Rule 41, Amended and Supplemental Pleadings, are designed to promote answers that fully advise the petitioner and the Court of the Commissioner's litigating position.

Contrary to another comment, the Court is not inclined to require that an answer include the name and contact information of the Appeals officer assigned to a case. In the normal course, the Chief Counsel attorney filing the answer should be in a position to obtain and promptly share that information with the petitioner within a reasonable time after the answer is filed.

Another commenter suggested that an answer should not be required in small tax cases and instead Chief Counsel should provide petitioner with the name and contact information of the attorney assigned to the case. The Court eliminated answers in small tax cases in the past but subsequently concluded that, on balance, answers provide useful information for the Court and petitioners. The Court continues to view answers in small tax cases as a worthwhile and productive part of the Court's pretrial procedures.

Another commenter suggested that Rule 36 should be amended to require that answers include a statement regarding the timeliness of the petition. While a statement regarding the timeliness of the petition can be included in the answer, the Court sees no compelling reason to require such a statement in every answer. If the Commissioner takes the position that a petition was not timely filed, that matter can be raised in an answer or motion as appropriate.

In accordance with another comment, the Court has further amended paragraph (b) of Rule 36 to require the Commissioner to file an amendment to the answer (without leave of the Court) providing a copy of the relevant jurisdictional document if that document was not available at the time the answer was filed and is not otherwise part of the docket record.

The Court adopted the remaining amendments to Rule 36 as published.

Rule 41

The Court received no comments regarding the proposed amendments to Rule 41 and adopted the amendments as published, with an additional stylistic amendment to paragraph (b)(2).

Rule 61

In accordance with a comment suggesting that the practice of renumbering the Rules leads to unnecessary confusion, the Court deleted the text of Rule 61 and reserved the Rule.

Rule 62

In accordance with a comment, Rule 62 is no longer renumbered. The Court otherwise adopted the amendments to Rule 62 as published, with an additional stylistic amendment to the cross-reference to Rule 34(b)(3).

Rule 63

In accordance with a comment, Rule 63 is no longer renumbered. The Court otherwise adopted the amendments to Rule 63 as published, with an additional stylistic amendment to paragraph (b).

Rule 64

The Court received various comments expressing concerns regarding the effect intervention may have on petitioners' cost of litigation. The Court recognizes those concerns and expects they will be addressed, as necessary, on a case-by-case basis under Rule 64(b)(3). In accordance with a comment, the Court renumbered proposed new Rule 63 as Rule 64 and otherwise adopted the amendments as published.

Rule 70

The Court received comments suggesting that Rule 70 should be amended to include express limits on certain discovery requests to ensure that the discovery process is not unduly burdensome. In the light of the limitations on discovery set forth in Rule 70(c), the Court is satisfied that procedures are in place to avoid unduly burdensome discovery requests.

The Court received another comment suggesting that the Court should provide guidance as to how the Court will apply the proportionality standard set forth in Rule 70(b)(1). Evaluating whether discovery requests in a particular case are proportional to the needs of the case depends on several factors as outlined in Rule 70(b)(1), and those factors are best developed and weighed in the context of actual discovery disputes.

Another commenter suggested that the Court should amend Rule 70 to provide that discovery may include a request to inspect, copy, test, or sample discoverable materials. In the light of similar provisions set forth in Rule 72(a)(1) (production of documents, etc.) and Rule 147(a)(1)(C) (subpoenas), the Court concludes that an additional amendment to Rule 70 is unnecessary.

The Court received additional comments suggesting that the so-called clawback procedures set forth in paragraph (d)(2) of Rule 70 should be expanded to permit either party to raise matters of privilege or protection with the Court, under seal or otherwise, at any time. The Court adopted Rule 70(d)(2) to conform its practice with Rule 26(b)(5)(B) of the Federal Rules of Civil Procedure and is not inclined to vary from the language used in the Federal rule. In any event, the Court notes that Rule 70(d)(2) does not preclude a party who has received materials that may be privileged or protected from taking proactive steps, including notifying the opposing party and the Court, to ensure that privilege and protection questions are properly and timely addressed.

The Court adopted the amendments to Rule 70 as published, with additional stylistic amendments to paragraphs (a)(1), (c)(1), and (d).

Rule 74

The Court received a comment suggesting that it may be difficult in some circumstances for a party to obtain and provide the name of the officer before whom

a deposition is to be taken. The Court agrees with this comment and has amended Rule 74 to provide that a notice of deposition under paragraph (b) and a motion to take the deposition of an expert witness under paragraph (c) must include either the name of the officer or the reporting company before whom a deposition is to be taken. Any order approving the taking of a deposition under paragraph (e)(3) of Rule 74 will similarly include the name of the officer or reporting company before whom the deposition is to be taken.

The Court received another comment expressing concern over the burden of multiple depositions and suggesting that Rule 74 be amended to include a cross-reference to the proportionality principles contained in Rule 70(b)(1). Because Rule 70(b)(1) sets forth proportionality principles that are applicable to all forms of discovery, including discovery depositions under Rule 74, there is no need for a cross-reference. Specific concerns regarding potentially abusive requests for depositions may be addressed on a case-by-case basis.

The Court otherwise adopted the amendments to Rule 74 as published, with additional stylistic amendments to paragraphs (b)(1), (c), and (e)(3).

Rule 81

In accordance with a comment, the Court has amended paragraph (b)(1)(G) of Rule 81 to provide that an application to take a deposition must include the name of the officer or the reporting company before whom a deposition is to be taken. Any order approving the taking of a deposition under paragraph (b)(2) of Rule 81 will similarly include the name of the officer or reporting company before whom the deposition is to be taken.

The Court received comments recommending Rule 81(b)(2) be revised to conform to the revised electronic filing requirements in Rule 23(b). The Court adopted an amendment in accordance with the comments received.

The Court otherwise adopted the amendments to Rule 81 as published, with additional stylistic amendments to paragraphs (e)(3) and (f)(2).

Title IX

The Court received no comments regarding the proposed amendments to Title IX and adopted the amendments as published.

Rule 90

The Court received no comments regarding the proposed amendments to Rule 90 and adopted the amendments as published.

Rule 91

The Court received no comments regarding the proposed amendments to Rule 91 and adopted the amendments as published.

Rule 92

In accordance with a comment suggesting that the practice of renumbering the Rules leads to unnecessary confusion, the Court deleted the text of existing Rule 92 and reserved the Rule. The Court otherwise received no comments regarding the proposed amendments to Rule 92 and adopted the amendments as published.

Rule 93

In accordance with a comment, the Court renumbered proposed new Rule 92 as Rule 93. New Rule 93 governs the identification and certification of the administrative record in certain cases. (All references to comments regarding Rule 93 are to comments submitted in response to proposed Rule 92.)

The Court amended paragraph (a) of Rule 93 by substituting the word "solely" for the word "wholly." The Court received a comment suggesting that the Court amend paragraph (a) of Rule 93 by substituting the word "authenticity" for the word "genuineness" to conform with terminology used in Rule 901 and 902 of the Federal Rules of Evidence. The Court considers the use of the term "genuineness" in the context of new Rule 93(a) to be clear and unambiguous, and no further amendment is necessary.

Several commenters suggested that the Court should amend Rule 93(a) to expand and/or alter the deadline for filing the administrative record. In accordance with such comments, Rule 93(a) now provides that the administrative record normally must be filed with the Court no later than 45 days after the notice setting the case for trial is served. If the parties are unable to stipulate, the Commissioner is expected to file the administrative record, certified as to its genuineness, within the same 45-day period. Although there is a variety of views as to the best time to file the administrative record, the Court is satisfied that, for administrative purposes, the date of service of the notice setting a case for trial remains the most practical date to mark the start of the filing period. It is worth noting that Rule 93(a) does not prohibit or discourage the Commissioner from providing the petitioner with a copy of the administrative record earlier in the proceedings; the Rule provides only that the parties or the Commissioner file the administrative record "no later than" 45 days after the case is set for trial. Moreover, the deadline set forth in Rule 93(a) is not entirely rigid and may be extended "as ordered by the Court."

One commenter suggested that Rule 93 should be amended by adding specific provisions for motions practice related to the preparation and filing of the administrative record. It is not the Court's intent to promote or discourage the filing of motions in connection with the identification and certification of the administrative

record. The Court expects that the parties will proceed in good faith and resort to motions practice as appropriate.

When the Court proposed new Rule 93, paragraph (c) of the Rule set forth a definition of the term "administrative record" that included a comprehensive list of the items that might be included in an administrative record. Commenters raised concerns that the proposed definition could prove to be both overinclusive and underinclusive. In response to these concerns and recognizing that the composition of the administrative record will vary depending on the type of action subject to review, the Court has adopted a more generic definition of the term "administrative record" to include "all documents and materials received, developed, considered, or exchanged in connection with the administrative determination."

A number of comments suggested that the Court should adopt specialized Rules applicable in whistleblower cases. The Court believes that adopting specialized rules is not warranted at this time, as procedures in whistleblower cases are still emerging. Furthermore, concerns about the nature and timing of the IRS's creation of the administrative record before the filing of the petition are beyond the scope of these Rules.

Paragraph (e) of Rule 93 provides that the Court may direct the parties to follow the procedure set forth in the Rule in any case where identification and certification of the administrative record may contribute to a prompt resolution of the case. A comment expressed a concern that new Rule 93 could be read to apply to cases in which Treasury Department regulations and related administrative guidance are challenged and subject to review pursuant to the Administrative Procedures Act, 5 U.S.C. sec. 551, et seq. The Court does not contemplate that Rule 93 will apply in the scenario identified by the comment. As noted above, however, the Court has the discretion to invoke the Rule if deemed expedient to the prompt resolution of the case, and any such determination would be explained in any Court order issued pursuant to paragraph (e).

The Court otherwise adopted new Rule 93 as published.

Rule 103

The Court received no comments regarding the proposed amendments to Rule 103 and adopted the amendments as published, with an additional stylistic amendment to paragraphs (a)(4).

Rule 110

The Court received no comments regarding the proposed amendments to Rule 110 and adopted the amendments as published.

Rule 121

The Court received a comment suggesting that Rule 121(a)(2) should be amended to clarify that a party moving for partial summary judgment need only show that no genuine dispute exists as to any material fact pertinent to the specific issue for which partial summary judgment is sought. The amendments to Rule 121 are intended to conform the Rule more closely to Rule 56 of the Federal Rules of Civil Procedure. The Court does not find additional clarification to be necessary.

The Court received several comments regarding paragraph (j) of Rule 121. The application of Rule 121(j) will be informed by the Court's existing jurisprudence in cases requiring judicial review based solely on the administrative record and in the Court's disposition of disputes that might arise in the future.

The Court received no other comments; the Court adopted the proposed amendments to Rule 121 as published.

Rule 133

The Court received no comments regarding the proposed amendments to Rule 133 and adopted the amendments as published.

Rule 140

The Court received no comments regarding the proposed amendments to Rule 140 and adopted the amendments as published, with an additional stylistic amendment to paragraph (a)(1).

Rule 141

The Court received no comments regarding the proposed amendments to Rule 141 and adopted the amendments as published, with an additional stylistic amendment to the cross-reference to Rule 34(b)(3).

Rule 147

The Court received a comment expressing concern that new paragraph (a)(3) of Rule 147, which requires advance notice of a subpoena commanding production of documents, might jeopardize a party's protection under the work-product doctrine. Given that Rule 147(a)(3) conforms with paragraph (a)(4) of Rule 45 of the Federal Rules of Civil Procedure, the Court sees no need for further amendment.

The Court received several comments pertaining to Rule 147(d) (protecting a person subject to a subpoena; enforcement). One commenter suggested that Rule 147(d) should be amended to provide that a person receiving a subpoena will have at least 15 days to object to the issuance of a subpoena on the ground it is burdensome. Rule 147(d) conforms in substance with Rule 45(d) of the Federal Rules of Civil

Procedure and contains provisions, including sanctions, that adequately protect the interests of persons subject to a subpoena.

Another commenter suggested that Rule 147(d) should be amended to state that a person subject to a subpoena need not respond while a motion to quash or modify the subpoena is pending. The Court concludes that the disposition of a motion to quash or modify a subpoena will depend on the facts and circumstances of the case and should fall squarely within the discretion of the judicial officer assigned to the matter. Consequently, no further amendment to Rule 147(d) is warranted.

One commenter suggested that paragraph (e) of Rule 147 should be amended to provide that either party may raise an issue that information sought by way of a subpoena is privileged or protected work product and that the matter may be raised under seal or otherwise. The Court notes that Rule 147(e) does not preclude a party who has received materials that may be privileged or protected from taking proactive steps, including notifying the opposing party and the Court, to ensure that privilege and protection questions are properly and timely addressed.

The Court adopted the amendments to Rule 147 as published, with an additional stylistic amendment to paragraph (e)(2)(B).

Rule 151

In accordance with a comment, and to avoid ambiguity, the Court has amended paragraph (b)(1) and (2) of Rule 151 by replacing the word "thereafter" with the phrase "after the due date of the opening brief" in both places where that term is used.

The Court otherwise adopted the amendments to Rule 151 as published, with additional stylistic amendments to paragraphs (b) and (c).

Rule 151.1

The Court proposed numbering the new rule governing briefs of amicus curiae as Rule 152, and renumbering existing Rule 152, Oral Findings of Fact or Opinion, as Rule 153. In accordance with comments, and to avoid confusion that might arise in connection with renumbering the Rules, the Court has instead adopted the new rule governing briefs of amicus curiae as Rule 151.1. (All references to comments regarding Rule 151.1 are to comments submitted in response to proposed Rule 152.)

Several commenters suggested that the Court should adopt procedures for requesting an amicus or appointing an amicus or pro bono counsel. The Court appreciates that such procedures could be useful in cases brought by self-represented petitioners presenting unique or novel issues. The suggestion merits further study and potential development.

The Court received a comment suggesting that the Court should provide guidance regarding a request to enlarge the 25-page limit for amicus curiae briefs. The Court has adopted changes to paragraph (d) of Rule 151.1 to address the comment.

Another commenter suggested that the Court should amend Rule 151.1(e) to state that motions for extension of time to file an amicus brief will be freely given. The Court believes that the filing periods set forth in Rule 151.1(e) are adequate and, in any event, Rule 151.1(e) does not preclude an amicus curiae from seeking leave of the Court to file an amicus brief out of time.

The Court received a comment suggesting that Rule 151.1 should be amended to provide that an amicus curiae need not file a motion for leave to file a brief if all the parties to the case consent to the filing of the amicus brief. The Court modeled Rule 151.1 partly on procedures set forth in Rule 29 of the Federal Rules of Appellate Procedure. Until the Court has gained practical experience under new Rule 151.1, and absent a compelling argument for doing so, the Court is not inclined to alter the requirement that an amicus curiae file a motion for leave to file a brief.

Another commenter suggested that Rule 151.1(g) should be amended to require a party filing an objection to a motion for leave to file an amicus brief to specify why the party believes the administration of tax laws would be hindered by allowing the filing of an amicus brief. The Court is satisfied that the requirement that an objection must "concisely state the reasons for such opposition" will suffice to fully inform the Court, the opposing party, and the amicus curiae of the nature of the objection.

Another commenter suggested that Rule 151.1 should be amended to establish a rebuttable presumption that amicus briefs filed on behalf of pro se petitioners are justified. Although such a rebuttable presumption offers some facial appeal, the Court believes it is best to gain practical experience with amicus curiae filings under the new procedures set forth in Rule 151.1 before considering alternatives to those procedures.

The Court otherwise adopted new Rule 151.1 as published with additional stylistic amendments to paragraphs (c)(1) and (e).

Rule 152

In accordance with comments, Rule 152 is not renumbered. The Court otherwise adopted the amendments to Rule 152 as published.

Rule 161

The Court received no comments regarding the proposed amendments to Rule 161 and adopted the amendments as published.

Rule 170

The Court received no comments regarding the proposed amendments to Rule 170 and adopted the amendments as published.

Rule 171

The Court received no comments regarding the proposed amendments to Rule 171 and adopted the amendments as published.

Rule 180

The Court received no comments regarding the proposed amendments to Rule 180 and adopted the amendments as published.

Rule 182

The Court received no comments regarding the proposed amendments to Rule 182 and adopted the amendments as published.

Rule 210

In accordance with a comment, the Court has amended the definition of the term "exempt organization" in Rule 210(b)(5) by replacing "section 501(c)(3)" with "section 501(c) or (d)." The effect of this amendment is to bring a declaratory judgment action authorized under Code section 7428(a)(1)(E) within the definition of an "exempt organization action" as defined in Rule 210(b)(11)(E). The Rule amendment accounts for a 2015 statutory change to Code section 7428.

Consistent with comments on proposed Rule 93, paragraph (b)(12) of Rule 210 is amended to conform the definition of the term "Administrative Record" to that set forth in paragraph (c) of new Rule 93 (Identification and Certification of Administrative Record in Certain Actions).

The Court received no other comments; the Court adopted the remaining amendments to Rule 210 as published.

Rule 213

The Court received no comments regarding the proposed amendments to Rule 213 and adopted the amendments as published.

Rule 217

The Court received no comments regarding the proposed amendments to Rule 217 and adopted the amendments as published.

Rule 231

The Court received no comments regarding the proposed amendments to Rule 231 and adopted the amendments as published.

Rule 233

The Court amended Rule 233 to conform to the reorganization and stylistic changes of Rule 34. There has been no substantive change.