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October 30, 2015

Honorable Michael B. Thornton, Chief Judge
United States Tax Court
400 Second Street, N.W.
Washington, D.C. 20217

RE: Comments on Tax Court Rules and Procedures

Dear Chief Judge Thornton,

We appreciate the Tax Court's solicitation of comments, concerns and proposals regarding the Court's rules of practice and procedure.

The Court's rules and procedures have generally promoted the interests of taxpayers and the effective administration of the Internal Revenue laws. The IRS Office of Chief Counsel has suggested that the Tax Court change Rule 74 to allow "non-consensual depositions of party witnesses upon notice to the party without requiring leave of the Court by motion." We respectfully disagree with the Office of the Chief Counsel and ask that the Tax Court keep Rule 74 in its current form.

Tax Court Rule 74(c) prohibits non-consensual depositions unless the deposing party takes leave of the Court by motion and shows that it cannot obtain the testimony sought through other means of discovery. Rule 74(c) is in contrast to the Federal Rules of Civil Procedure, which allow non-consensual depositions as a matter of course.

The Tax Court's discovery rules have always been more restrictive than those in the Federal District Courts and this has been intentional. As the Tax Court noted, "unnecessarily broad discovery may cause extensive delays and jeopardize the administration, the integrity, and the effectiveness of the Internal Revenue laws."¹ Adopting the Office of Chief Counsel's proposed change would risk transforming the Tax Court from a "relatively uncomplicated and inexpensive format" for deciding tax contests to one characterized by prolonged and costly litigation.² Such a result would not only unreasonably burden taxpayers but would also constitute an unnecessary use of the Federal government's valuable time and resources.

Additionally, the Tax Court has explained that broad discovery rules would give the IRS an unfair advantage in Tax Court litigation:

In the District Court, the 'field' is circumscribed when the complaint and answer are filed... The 'field' in a Tax Court proceeding is not circumscribed by the filing of the petition and answer. The

¹ See *Ash v. C.I.R.*, 96 T.C. 459, 463 (1991).

² See *Westreco, Inc. v. C.I.R.*, T.C. Memo 1990-501.

'field' is first delineated when the Commissioner examines the taxpayer's tax returns... the Commissioner has substantial tools to ascertain the facts before he mails a statutory notice of deficiency to the taxpayer which provides the taxpayer with a 'ticket' to the Tax Court.³

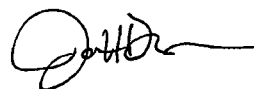
By the time litigation begins in Tax Court, the IRS has already had an opportunity to conduct extensive discovery through the audit process. Among the IRS' examination tools is its summons power, which allows the IRS to obtain oral testimony from taxpayers. Affording the Service another unfettered opportunity to depose taxpayers during litigation would unduly burden taxpayers and tilt the field in the government's favor.

Moreover, the current rule does not prohibit the IRS from taking non-consensual depositions. Non-consensual depositions are available as long as the deposing party takes leave of the Court and demonstrates that it cannot obtain the testimony sought through other available means of discovery. Rule 74 is not meant to ban non-consensual depositions but rather to make this method of discovery available only "where there exists a specific and compelling basis for its use."⁴ Given that the government already is able to use non-consensual depositions to obtain information when truly necessary, amending Rule 74 as the Office of Chief Counsel suggests will not result in a net gain to the government. Instead, the suggested amendment will only sanction "fishing expeditions" under the guise of discovery, one of the very things that the Rule is intended to prevent.⁵

In sum, we believe that Rule 74 serves the interests of taxpayers and the government. Its restriction on the use of non-consensual depositions acknowledges the government's broad pre-petition discovery power while still recognizing that non-consensual depositions are sometimes truly necessary during Tax Court litigation. Additionally, the Rule acknowledges the near certainty that an unqualified right to depose will lead to an increase in litigation cost, time and hostility and make the Tax Court a much less attractive forum for resolving tax disputes. Given the delicate balance that Rule 74 strikes, adopting the Office of Chief Counsel's proposed change will only serve to burden taxpayers and weaken the effective administration of the Internal Revenue laws. As such, we ask that the Court not make any changes to Rule 74.

Thank you for the opportunity to comment on the Court's rules and procedures. We welcome the opportunity to meet with the Court to discuss our comments in greater detail or to answer any questions that you may have. Please do not hesitate to contact us with any questions or for any additional information that you would find useful.

Sincerely,



John H. Dies
Zerbe, Fingeret, Frank & Jadav, P.C.

³ *Id.*

⁴ *K&M La Botica Pharmacy, Inc. v. C.I.R.*, T.C. Memo 2001-33 (discussing Rule 74, then codified as Rule 75).

⁵ *See id.*