TAX SECTION
State Bar of Texas

October 30, 2015

By First Class Mail

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

RE: Comments on United States Tax Court's Rules of Practice and Procedure

Dear Chief Judge Thornton:

On behalf of the Tax Section of the State Bar of Texas, I am pleased to submit the enclosed response to the Court's invitation for comments, concerns and proposals regarding its Rules of Practice and Procedure.

THE COMMENTS ENCLOSED WITH THIS LETTER ARE BEING PRESENTED ONLY ON BEHALF OF THE TAX SECTION OF THE STATE BAR OF TEXAS. THE COMMENTS SHOULD NOT BE CONSTRUED AS REPRESENTING THE POSITION OF THE BOARD OF DIRECTORS, THE EXECUTIVE COMMITTEE OR THE GENERAL MEMBERSHIP OF THE STATE BAR OF TEXAS. THE TAX SECTION, WHICH HAS SUBMITTED THESE COMMENTS, IS A VOLUNTARY SECTION OF MEMBERS COMPOSED OF LAWYERS PRACTICING IN A SPECIFIED AREA OF LAW.

THE COMMENTS ARE SUBMITTED AS A RESULT OF THE APPROVAL OF THE COMMITTEE ON GOVERNMENT SUBMISSIONS OF THE TAX SECTION AND PURSUANT TO THE PROCEDURES ADOPTED BY THE COUNCIL OF THE TAX SECTION, WHICH IS THE GOVERNING BODY OF THAT SECTION. NO APPROVAL OR DISAPPROVAL OF THE GENERAL

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MEMBERSHIP OF THIS SECTION HAS BEEN OBTAINED AND THE COMMENTS REPRESENT THE VIEWS OF THE MEMBERS OF THE TAX SECTION WHO PREPARED THEM.

We thank the Court for inviting comments regarding its rules and procedures, and we appreciate being extended the opportunity to participate in this process.

Respectfully submitted,

Alyson Outenreath, Chair
State Bar of Texas, Tax Section

cc: The Honorable William J. Wilkins
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Internal Revenue Service
1111 Constitution Avenue, N.W.
Washington, D.C. 20224

COMMENTS ON UNITED STATES TAX COURT'S
RULES OF PRACTICE AND PROCEDURE

These comments on the United States Tax Court's ("Court's") Rules of Practice and Procedure ("Comments") are submitted on behalf of the Tax Section of the State Bar of Texas. The principal drafter of these Comments was Richard L. Hunn, who is Chair of the Tax Controversy Committee of the Tax Section of the State Bar of Texas. Juan F. Vasquez, Jr., who is Chair of the Pro Bono Committee of the Tax Section of the State Bar of Texas, also drafted substantive portions of these Comments. The Committee on Government Submissions ("COGS") of the Tax Section of the State Bar of Texas has approved these Comments. Henry Talavera, Jeff Blair, and Jason Freeman reviewed these Comments and made substantive suggestions on behalf of COGS. Michael A. Villa, Jr. also substantively reviewed these Comments.

Although members of the Tax Section who participated in preparing these Comments have clients who would be affected by the principles addressed by these Comments or have advised clients on the application of such principles, 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: October 30, 2015

These comments are provided in response to the Court's invitation for comments, concerns and proposals regarding the Court's Rules of Practice and Procedure. The Tax Section thanks the Court for its efforts to improve and modernize its rules and procedures and for the opportunity to provide input in that process.

Most of the Tax Section's comments relate, and are in response, to proposals made by the Internal Revenue Service Office of Chief Counsel in its letter addressed to the Court on September 11, 2015 (individually, "Chief Counsel's Proposal" and collectively "Chief Counsel's Proposals"). We largely agree with Chief Counsel's Proposals and believe that they represent constructive recommendations to improve the Court's rules and procedures. However, there are certain areas where our views respectfully differ from those of Chief Counsel, and we have provided our perspective and comments on those areas below. In addition, we have provided the following suggestions regarding the Court's rules and procedures:

1. We recommend that the Court amend Rule 110(b) to explicitly provide that the Court may schedule a pretrial conference to require the return of subpoenas *duces tecum* directed to third-party record custodians.
2. Where a petitioner files a petition with this Court that inadvertently fails to include a notice of deficiency or notice of determination, rather than issuing an order, as Chief Counsel proposes, that directs the petitioner to correct the deficiency or face dismissal, we recommend that the Court adopt a procedure whereby the Commissioner determines whether such a notice has been issued and attaches it to the Commissioner's answer or response or otherwise asserts that no such notice has been issued.
3. We respectfully disagree with Chief Counsel's recommendation that Rule 74 be amended to allow nonconsensual depositions of party witnesses upon notice to the party without requiring leave of the Court by motion.
4. We recommend that the Court's Standing Pretrial Order be revised to clarify that a certificate of service is not required when the document in question is filed electronically with the Court and the opposing party has consented to receive electronic service from the Court.
5. Finally, we support a requirement that the Commissioner's answer (or a form cover letter accompanying it) provide the contact information of the Chief Counsel attorney responsible for the case, and the time frame within which the petitioner will be contacted by an Appeals or Settlement Officer. However, we respectfully disagree with Chief Counsel's recommendation to permit a general denial.

Chief Counsel's Proposal Regarding Subpoenas

Chief Counsel expressed concern that litigants encounter difficulty obtaining documents from third-party custodians of records in a timely fashion, because trial subpoenas are made returnable at the call of the calendar for the trial session on which a case has been calendared. Chief Counsel states that third-party custodians of records such as financial institutions often will not produce documents subject to a subpoena *duces tecum* until the return date. According to

Chief Counsel, this hinders the parties' ability to adequately examine the documents and prepare for trial, as well as to stipulate to or authenticate documents. In our experience, however, third-party custodians of records routinely comply with subpoenas *duces tecum* in advance of trial so that they can avoid appearing at trial.

Chief Counsel advances several alternative proposals to address this issue. One such proposal is far preferable to the others. Specifically, we agree with Chief Counsel's proposal to amend Rule 110(b) to expressly authorize the Court to require a third-party custodian of records to return a subpoena *duces tecum* at a pretrial conference. We agree with Chief Counsel that the Court has, on rare occasions, scheduled a pretrial conference to allow for the return of a subpoena *duces tecum* directed to a third party. We respectfully suggest that it would be helpful to amend Rule 110(b) to explicitly provide that the Court may schedule a pretrial conference to require the return of a subpoena *duces tecum* directed to a third-party custodian.

We suggest that Chief Counsel's alternative proposals, however, would likely be problematic for practitioners and could potentially lead to abuses by parties before the Court. Chief Counsel proposes amending Rule 147 to generally allow for the return of subpoenas *duces tecum* addressed to third-party custodians of records in advance of trial.[1] In effect, this proposal would allow parties to proceed with such subpoenas without the Court's prior knowledge and supervision. This could result in litigants abusing the process, necessitating the Court's intervention perhaps through a motion to quash.

While Fed. R. Civ. P. 45 allows a party in federal district court to serve document subpoenas on third parties that are returnable before trial without prior involvement of the court, that approach would not be effective or efficient for litigation in Tax Court. While the Tax Court has nationwide subpoena power, the Court does not sit continually in every part of the country. The Court would thus face difficulty administering Chief Counsel's proposal. As a result, we recommend that the Court amend Rule 110(b), as discussed above, to provide for the return of such subpoenas at a pretrial conference at a time and place determined by the Court to be practicable and appropriate.

Chief Counsel also proposes amending Rules 74 and 147(d) to provide a procedure for streamlined, nonconsensual depositions of third-party custodians of records. Under this proposed procedure, the party seeking the deposition would be presumed to have satisfied the requirement that the documents cannot be obtained through other methods of discovery, and the burden to quash the subpoena would be placed on the objecting party. However, the fact that a party is pursuing a nonconsensual deposition implies that the opposing party will not consent to a deposition. In our experience, parties routinely stipulate to consensual depositions of third-party

[1] Chief Counsel also suggests that the Court could consider scheduling hearings, including via the Electronic Courtroom, to allow for the return of subpoenas at least 30 days prior to trial. As noted above, we recommend that this issue be addressed by an amendment to Rule 110(b) expressly allowing the Court to schedule pretrial conferences for purposes of return of subpoenas *duces tecum* directed to third-party custodians, rather than pursuant to a more general amendment to Rule 147.

custodians of records. In those instances where a party seeks a nonconsensual deposition, it is typically because the other party has reasons to object. A procedure that presumptively overrides those objections would contravene the Tax Court's established practice of requiring the parties to cooperate through informal means of discovery before resorting to more formal methods of discovery.[2]

Chief Counsel's Proposal Regarding Imperfect Petitions: Filing Fee, Signature, and Attached Notice

Chief Counsel recommends that when petitions are filed that (i) are not signed, (ii) lack an attached notice of deficiency or notice of determination, or (iii) otherwise do not comply with the Court's rules concerning the content of a petition, the Court should issue an order directing the petitioner to correct the defect or face dismissal. Chief Counsel further recommends that the Commissioner should not be required to file an answer or otherwise respond to the petition until the order has been satisfied or discharged.

We respectfully disagree with these recommendations to the extent that they would result in the dismissal of a case for failure to attach a notice of deficiency or notice of determination to the petition. Such circumstances invariably involve *pro se* petitioners who are often unsophisticated and may not understand the difference between one type of notice or another, or who may fail to retain a copy of the pertinent notice. We suggest that it would be unfair to dismiss a petition for failure to attach a notice of deficiency or notice of determination—particularly petitions filed by *pro se* petitioners—when the Commissioner can readily search his records under the taxpayer's name and taxpayer identification number to determine if there is a notice of deficiency or notice of determination. We instead suggest that the Commissioner, after determining whether such a notice exists, attach it to the Commissioner's answer or response or otherwise assert that there is no such notice.

Deposition of Party Witnesses

We respectfully disagree with Chief Counsel's recommendation that Rule 74 be amended to allow nonconsensual depositions of party witnesses upon notice to the party without requiring leave of the Court by motion. As Chief Counsel correctly acknowledges, under the current version of Rule 74, the Court considers the deposition of a party witness to be an extraordinary method of discovery that is only available when other means of gathering information fail, and that requires either consent of the parties or leave of the Court. Chief Counsel correctly acknowledges that this may be the result of the Court's policy to encourage the informal exchange of information.[3] Chief Counsel further correctly notes that this may also be in recognition of the extensive fact gathering available during the examination stage.

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[2] *See e.g.,* T.C. Rule 70(a)(1); *Branerton Corp. v. Comm'r*, 61 T.C. 691 (1974); *Odend'hal v. Comm'r*, 75 T.C. 400 (1980).

[3] *See* T.C. Rule 70(a)(1); *Branerton Corp. v. Comm'r*, 61 T.C. 691 (1974).

Chief Counsel justifies the proposed expansion of nonconsensual party depositions on grounds that the current rules may hinder trial preparation in some large, complex and extremely factual cases, such as transfer pricing cases, where the petitioner may attempt to restrict even informal access to significant fact witnesses. However, this justification overlooks the Commissioner's substantial powers during the examination stage, including the Commissioner's ability to issue administrative summonses and to enforce them in court. Indeed, the Commissioner is even permitted to utilize information obtained by administrative summonses issued after the examination has concluded, so long as they are issued before a petition is filed with this Court.[4] The Commissioner's justification also gives little weight to the formal discovery procedures—interrogatories, requests for production, and requests for admission—that are available after the case is docketed with the Court.

Our primary concern, however, with the proposed expansion of nonconsensual depositions of party witnesses is that it would, in effect, be an entirely one-sided grant of authority. Because the Court generally will not look behind a notice of deficiency,[5] the petitioner will rarely be able to depose the Commissioner's witnesses. Hence, this proposed rule change would almost always give the Commissioner the power to obtain nonconsensual depositions of party witnesses of the petitioner, but the petitioner would almost never have the power to obtain nonconsensual depositions of the Commissioner's witnesses.

Standing Pretrial Order

When a case is calendared on a trial session, the current version of the Court's Standing Pretrial Order provides as follows:

> It is ORDERED that every pleading, motion, letter, or other document (with the exception of the petition and the posttrial briefs, see Rule 151(c)) submitted to the Court shall contain a certificate of service as specified in Rule 21(b), which shows that the party has given a copy of that pleading, motion, letter or other document to all other parties.

This provision seems to contradict Rule 21(b)(5), which allows a party to effectuate service pursuant to the electronic service procedures prescribed by the Court. Those procedures expressly provide that if the other party has consented to receive electronic service from the Court, the party filing electronically is not required to include a certificate of service. This provision of the Court's Standing Pretrial Order, read literally, would nevertheless appear to require a party filing electronically to include a certificate of service when the other party has consented to receive service electronically from the Court. We recommend that the Standing Pretrial Order be revised to clarify that a certificate of service is not required when the document

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[4] *See Ash v. Commissioner*, 96 T.C. 459 (1991).

[5] *See Greenberg's Express, Inc. v. Commissioner*, 62 T.C. 324, 327-328 (1974).

in question is being filed electronically with the Court and the opposing party has consented to receive electronic service from the Court.

Answers in Small Tax Cases

Chief Counsel proposes several changes to Rule 173 regarding answers in small tax cases. These include allowing the Service to file an answer that consists of: (1) a general denial of the allegations in the petition; (2) contact information of the Chief Counsel attorney responsible for the case; and (3) the time frame within which the petitioner will be contacted by an Appeals or Settlement Officer. The stated purpose of these changes is to reduce confusion that the current answer practice creates for a significant percentage of *pro se* taxpayers.

We share Chief Counsel's goal of minimizing confusion for *pro se* taxpayers. We are a proud participant in the Tax Court's calendar call program, and our volunteer attorneys and Chief Counsel have worked closely to make the calendar call program a success in Texas and to maximize the extent to which *pro se* taxpayers understand the judicial review process. Our experience in the program has also given us insight into which procedural improvements may help (and which may not) with the continuing effort to demystify the judicial process for unrepresented taxpayers. Based on this experience, we fully support a requirement that the answer (or a form cover letter accompanying it) provide the contact information of the Chief Counsel attorney responsible for the case and the time frame within which the petitioner will be contacted by an Appeals or Settlement Officer.

However, we respectfully disagree with Chief Counsel's recommendation to permit a general denial. Rather, we recommend that the administrative file be consulted to the greatest extent time permits and that as much information as possible be provided in the answer, including perceived documentation or substantiation deficiencies in a *pro se* taxpayer's case. In addition, we recommend that the Service accompany the filing of its answer with a statement that clarifies that the answer filed by the Service is not a ruling by the Court on the taxpayer's petition and represents only the view of the Service, who is not the decision-maker in the proceedings. Many *pro se* taxpayers may already be confused about the relationship between the Service and the Tax Court, and receiving an answer may lead certain *pro se* taxpayers to believe that their case has been decided against them. We believe a clear statement such as the one suggested here should minimize such confusion.