UNITED STATES TAX COURT
WASHINGTON, D.C. 20217

March 18, 2011

PRESS RELEASE

On December 20, 2010, Chief Judge John O. Colvin announced proposed amendments to the Tax Court Rules of Practice and Procedure affecting time periods for filing summary judgment motions, Rule 155 computations, motions regarding elections to proceed under the small tax case procedure, and answers in lien and levy cases, as well as other proposed amendments to Rules and forms. Comments were invited and were due by March 7, 2011.

Chief Judge Colvin announced today that written comments to the proposed amendments have been received. Also received were comments proposing amendments to the Court's Rules regarding whistleblower award appeals. The comments are attached to this press release and are available at the Tax Court's Web site, www.ustaxcourt.gov.

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

OFFICE OF THE CHIEF COUNSEL

MAR 9 2011

Robert R. DiTrolio
Clerk of the Court
United States Tax Court
400 Second Street, N.W.
Washington, D.C. 20217

Reference: Proposed Amendments to Tax Court's Rules of Practice and Procedure

Dear Mr. DiTrolio:

Thank you for the opportunity to comment on the proposed amendments to the Tax Court Rules of Practice and Procedure. We offer the following comments on behalf of the Office of Chief Counsel.

1. Business Hours of the Office of the Clerk

We have no comment with respect to proposed Rule 10(d) to clarify the court's business hours.

2. References to Special Trial Judges

We agree with proposed amendments to Rules 12, 22, 150, and 151 to include references to Special Trial Judges.

3. Ownership Disclosure Statements

We agree with the proposed amendments to Rule 20(c) to expand the ownership disclosure requirements to petitions filed pursuant to TEFRA procedures to assist the court's determination of whether conflicts exist affecting the assignment of particular judges to individual cases. In light of questions received from our trial attorneys, we recommend that the court clarify that the failure to file an ownership disclosure statement does not affect the time for filing a responsive pleading or motion with respect to the petition within the periods prescribed by Rule 36(a). It may also be appropriate to include an admonition that the failure to file the ownership disclosure statement may result in an order of dismissal for lack of prosecution and the entry of a decision sustaining the Commissioner's determinations. See, e.g., BMUR Holdings, Inc. and Subs. v. Commissioner, Docket No. 25313-10 (Order of Dismissal and Decision entered Feb. 17, 2011, vacated, Feb. 28, 2011).

4. Recognition of Law Student Assistance; Withdrawal of Counsel Due to a Change or Substitution in Party

We agree with the proposed amendment to Rule 24(a) to conform the court's Rules to the practice of law students participating in Tax Court proceedings under the direct supervision of attorneys. We also agree with the proposed amendment of Rule 24(f) to clarify procedures for counsel to withdraw after a substitution of parties.

5. Lien and Levy Actions

We agree fully with the court's objectives of expediting consideration of lien and levy cases. We are concerned, however, that the proposals may not achieve the results articulated. The time period for filing any pleading in a lien and levy action and setting cases for trial must strike an appropriate balance. With respect to answers, that balance is between expediting the process for filing the answer and having the matter at issue, and providing a period long enough to minimize the need for motions to extend the time to file answers. In particular, based on our experience, a 30-day rule for filing an answer in these types of cases will increase the filing of motions to extend the time to answer because the administrative file will not always have been received in time to permit the preparation of a proper answer addressing all of the issues raised in the petition. The proposals may also interfere with the Commissioner's ability to develop fully those cases needing trial and, in some cases, the proposals could protract rather than expedite resolution of these cases.

Supplemental Calendars

The court proposes to issue supplemental calendars for lien and levy actions. As proposed, the supplemental calendars would be issued no later than 3 months prior to a session to allow at least 30 days for the parties to file motions for summary judgment prior to the 60 day deadline for these motions in proposed Rule 121(a). We agree with the principle that placing lien and levy cases on calendars as soon as practicable will help expedite their resolution. Most cases presenting issues not subject to de novo review can be resolved solely on the basis of the administrative record. The expectation that a case will be calendared promptly should encourage an earlier focus on resolving these cases with dispositive motions. In those cases in which the administrative record may need to be supplemented with additional evidence, this expectation should also encourage the parties to begin the discovery process and engage in early settlement negotiations and trial preparation.

The court's proposal with respect to supplemental calendars, however, does not differentiate between lien and levy cases in which the underlying liability is properly before the court and those presenting only collection issues. Cases in which the underlying liability is in dispute are akin to deficiency proceedings and generally require

similar amounts of discovery and trial preparation, including gathering information and documents from the petitioner or third parties that are not contained in the administrative file. Even assuming that underlying liability issues can be developed fully on an abbreviated time schedule, the shortened window for trial preparation will impact the parties' ability to engage in meaningful informal consultation and exchange of information as required by the court's discovery rules. For instance, the parties could have as little as 15 days before formal discovery must be served following the issuance of a supplemental calendar 3 months before trial, in order to complete discovery and preserve time for any discovery-related enforcement motions within the time limits imposed by the court's discovery rules.

The court's proposal offers little guidance on which cases will be selected for supplemental calendars. We assume that, in most instances, cases will be selected when joinder of issue occurs after the issuance of the original calendar. In these cases, the parties' shortened window for trial preparation may be further limited by the restriction on commencing discovery under Rule 70(a)(2) during the 30 day period after a case is at issue. If a case becomes at issue immediately before the issuance of a supplemental calendar 3 months in advance of the trial session, the time limits on commencing and completing discovery in Rule 70(a)(2) will effectively eliminate the ability to engage in formal discovery in such cases. At the time the court proposes to issue supplemental calendars, our attorneys will be preparing a number of other cases on the original calendar for trial and may not be in a position, in this abbreviated timetable, to prepare and then try or resolve appropriately additional cases assigned to them on a supplemental calendar. In light of these considerations, we recommend that the court, in lieu of the supplemental trial calendar proposal, consider resurrecting the use of "trial status requests" through which the court inquires of the parties whether a particular case being considered for a supplemental calendar is ready for trial or disposition without trial.

As a further alternative to achieving the court's objectives in proposing to issue supplemental calendars, we recommend the priority calendaring of lien and levy cases on the next regularly scheduled trial session once joinder of issue occurs, allowing the parties the full 5-month period prior to trial following issuance of the trial calendar. This practice would likely speed resolution of cases from current practice but still allow the parties sufficient time to develop issues, engage in settlement negotiations, and file appropriate motions. Consideration of cases filed in locations where trial sessions are not frequently held could be expedited with the early assignment of these cases to Judges and Special Trial Judges, who could help the parties narrow issues and encourage the expeditious filing of dispositive motions. For those cases in which joinder of issue occurs after issuance of a trial calendar, the court may consider the scheduling of pretrial conferences pursuant to Rule 110, rather than calendaring them for trial. As described in Rule 110, these conferences may be useful in assisting the parties to narrow issues, stipulate facts, simplify the presentation of evidence, or

otherwise prepare the case for trial or possible disposition in whole or in part without trial. For example, a pretrial conference may result in a scheduling order setting deadlines for the completion of various trial preparation milestones and the filing of appropriate dispositive motions.

Rule 333(a)

We do not agree with the proposed amendment to Rule 333(a) to require the Commissioner to file an answer, or move, with respect to a lien or levy case within 30 days of service of the petition. Following the issuance of a notice of determination by the Commissioner's Office of Appeals, administrative files in lien and levy cases are maintained in processing centers located throughout the country. Upon service of a petition in a lien or levy case on the Commissioner, the processing center responsible for the case is directed to send the administrative file to the assigned attorney in the appropriate field office. We continue to improve and accelerate the transmission of administrative files to our Counsel offices, but a significant number of administrative files are not received within 30 days of service of the petition. This occurs in a substantial percentage of the total lien and levy cases filed with the court.

In cases in which the administrative file is not received prior to the answer preparation, it may be possible to answer the petition in conformity with the signature/certification requirements of Rule 33(b) on the basis of the notice of determination alone, if one is attached to the petition. Failure to attach the notice of determination occurs in a significant number of these cases as well, which correspondingly impacts on our ability to properly answer the case without the administrative file. In many cases, the administrative files are necessary for preparation of an answer to comply with Rule 33(b). In a number of other cases, the petition may raise liability issues for which the Commissioner bears the burden of proof and requires additional time and information to make appropriate affirmative allegations. Thus, the proposed 30-day time limit is likely to cause an increase in motions requesting extensions of time to file the answer.

Finally, often it is not clear from the petition whether a taxpayer seeks to invoke the court's lien and levy jurisdiction, the court's deficiency jurisdiction, or the court's jurisdiction on some other basis, especially when no notice of determination is attached to the petition. If proposed Rule 333(a) is adopted, we recommend that the court consider clarifying that the time limitations of proposed Rule 333(a) only apply when the petition properly follows the directive of Rule 331(b) and identifies itself as a Petition for Lien or Levy Action, attaching a copy of the notice of determination. To ensure that our attorneys comply with the appropriate deadlines for filing responsive pleadings, we recommend that the court clearly identify cases subject to Rule 333(a) with the appropriate letter suffix to the docket number, including small tax cases. Under current practice, lien and levy cases filed as small tax cases receive the letter designation "S"

rather than "L." To avoid confusion, we recommend that all lien and levy cases receive the "L" designation; if it is also necessary to distinguish small lien and levy cases, the court should consider using both letter designations for these cases, i.e., "LS" or "SL." Our attorneys should be able to rely on the 60-day answer period prescribed by Rule 36(a), if a petition does not carry the "L" designation (with or without the "S").

Finally, in lieu of adoption of the proposed 30-day time limit for answers, we recommend that the court retain the current 60-day time limit, but consider the case to be at issue at the time the answer is filed. From experience, it is rare that a reply is filed in these types of cases, and any affirmative allegations that may be set forth in the answer would be deemed denied under Rule 37(c). This alternative approach will serve to ensure that all lien and levy cases are at issue promptly and eligible for trial calendars in accordance with the court's procedures for calendaring cases.

Rule 121(a)

We agree with the court's proposed amendment to Rule 121(a) to require the filing of motions for summary judgment no later than 60 days prior to the call of the trial calendar. When read in conjunction with the proposed issuance of supplemental calendars and amendments to Rule 333(a), proposed Rule 121(a) may decrease the number of motions for summary judgment filed in lien and levy actions and thereby protract rather than expedite resolution. Cases placed on a supplemental calendar shortly after joinder of issue will result in a very short window, conceivably as short as 30 days, to file a motion for summary judgment. Additionally, our attorneys are typically preparing a number of cases for each trial session, requiring the efficient allocation of time to fully prepare those cases for trial. Given these burdens and the shortened window to file motions, more lien and levy cases may end up proceeding to trial rather than resolved earlier by a dispositive motion.

6. Motions and Motions Calendars

We agree with the proposed amendments to Rules 50(b)(2) and 130(a) to accurately reflect the current practice of Judges and Special Trial Judges often holding hearings on motions at trial sessions and often acting on motions on the basis of the filings alone. The court's ability to schedule motions every Wednesday rather than awaiting a trial session allows the court to expedite consideration of cases, particularly lien and levy cases. For cases in which the place of trial is in a city that the court visits infrequently, awaiting a trial session may inordinately delay the disposition of a procedural motion. Additionally, while resolving motions on the papers is sometimes expeditious, it has been our experience that the motions sessions allow for fuller development of issues that may not always be identified on the papers. An oral exchange with the court at a motions session is often efficient and obviates the need for

serial written responses to the parties' submissions.

7. Completion of Discovery

We agree with the proposed amendment to Rule 70(a)(2) to clarify that all discovery-related motions be filed no later than 45 days before trial unless otherwise authorized by the court. The court may further clarify that, in order to comply with the discovery completion time frame, discovery and admissions requests must be served no later than 75 days before the commencement of a trial calendar.

8. Depositions

We agree with the proposed amendments to Rule 74(a) to clarify the distinction between the court's procedures for taking depositions to perpetuate testimony and the procedures for taking depositions for discovery purposes.

9. Stipulations for Trial

We agree with the court's objective in revising Rule 91(a)(2) to clarify the potential conflict with Rule 90(f). Current Rule 91(a)(2) requires that matters obtained through discovery, including requests for admissions, "must" be included in the stipulation of facts to be considered by the court notwithstanding that any matter admitted under Rule 90 is deemed conclusively established. By substituting "should" for "must", the court lessens the potential conflict. Even as revised, proposed Rule 91(a)(2) may invite some confusion on whether admissions need to be included in a stipulation to be considered by the court. We recommend that the court provide an additional statement that Rule 91(a)(2) does not change the effect of an admission as conclusively established under Rule 90(f), even if omitted from the stipulation of facts.

10. Deadline for Summary Judgment Motions

We agree with the proposed amendment to Rule 121(a) to require that motions for summary judgment be filed no later than 60 days before the first day of the court's session for which the case is calendared for trial, unless otherwise permitted by the court.

11. Mediation

We fully agree with the expanded focus of proposed Rule 124 and the inclusion of procedures for the parties to seek voluntary nonbinding mediation and the assignment of a Judge or Special Trial Judge to act as mediator.

12. Deadlines for Rule 155 Computations

We agree with the proposed revisions to Rule 155 to include a 90-day deadline for filing of computations for entry of decision. Our attorneys currently make every effort to file Rule 155 computations as soon as possible after an opinion is issued. In most cases this occurs prior to the proposed 90-day deadline. The complexities of certain cases may require more than 90 days for the computations to be completed, agreed to by the parties and, in some cases, for the parties to narrow the points of disagreement as to the computations. Thus, the proposed revisions to Rule 155 are likely to increase the number of motions filed seeking additional time to file computations, or the filing of unagreed computations, if there is insufficient time to achieve an agreement between the parties. Accordingly, we recommend that the court recognize in the explanation of the rule that there may be exceptions to the 90-day deadline in appropriate cases upon leave of the court.

13. Removal of Small Tax Case Designation

We agree with the proposed amendments to Rule 171(b) to reinstate the requirement that the Commissioner file a motion opposing the small tax case election at the time an answer is filed. Early identification of cases with significant issues or when the jurisdictional limits of section 7463(a) are exceeded certainly assists the court in the management of its docket. We further agree with the retention of Rule 171(c), as newly numbered Rule 171(d), allowing parties to request removal of the small tax case designation at any time prior to trial. Often the significance of issues raised in a petition is not apparent until a case is developed for trial. We question whether respondent will need leave of court to file a motion opposing the small tax case election if made after the answer is filed, inasmuch as current Rule 172(c) (proposed to be renumbered 172(d)) permits a motion to remove the small tax case designation to be made at any time before trial. We recommend that the court clarify this point in the explanation of the rule.

Section 7463(d) allows the Commissioner, or a taxpayer, to request the removal of the small tax case designation at any time prior to a decision becoming final if the case no longer meets the jurisdictional requirements for a small tax case designation. In contrast, proposed Rule 171(d) requires a request for removal to be filed before commencement of a trial. We recommend that Rule 171 be further amended to confirm the continued availability of section 7463(d) until a decision becomes final.

Finally, we have been requested to provide advice on several occasions on whether a small tax case that is dismissed prior to trial is subject to appellate review. Current Rule 172(c) provides that the court will be deemed to have concurred in a small tax case election, in accordance with section 7463, at the commencement of the trial.

This suggests that prior to that time, a proceeding filed under section 7463 has not ripened into a small tax case and, therefore, a pretrial disposition may be appealed. The issue does not appear to have been addressed by the appellate courts. We recommend that the court clarify this matter by addressing the issue in its explanation to the rules, or alternatively, obviating the problem by removing the small tax case designation if a case is dismissed prior to trial.

14. Forms

Form 2

Revised Form 2 continues to omit a field for petitioners or practitioners to specify the years and amounts at issue in the petition. As with previous revisions, proposed Form 2 calls only for a statement of the year(s) or period(s) for which notices were issued, not those being disputed. Unless a petitioner takes the initiative to include this information somewhere in the petition, the omission places the Service in the position of sometimes having to speculate over what determinations are before the court, particularly when the petitioner fails to attach the notice of deficiency or other determination letter to the petition. A number of petitions that used existing Form 2 omitted a statement of the years and amounts at issue and failed to attach a notice of deficiency or other determination letter. Even when the determination letter is included as an attachment, the Service may not be certain of the matters intended to be placed at issue by the petitioner when the Service has made determinations covering multiple taxable periods, either in separate or combined determination letters.

In situations in which it is unclear what matters are before the court, the Service must take action to protect periods of limitations on assessment or collection that may otherwise expire when a Service determination is defaulted and not included in a petition. If such activity violates statutory restrictions on assessment and collection, the court may expect to see an increase in the number of motions to restrain assessment and/or collection under Rule 55. We recommend that Form 2 be revised to add a line that requires identification of the years and amounts intended to be petitioned in the case in order to minimize or avoid these problems.

Finally, we recommend that the check box identifying worker classification cases under section 7436 be modified to conform to the Service's current naming convention for worker determination notices. The Service now uses the title "Notice of Determination of Worker Classification," which simplified its title from the earlier "Notice of Determination Concerning Worker Classification Under § 7436." See Notice 2002-5, 2002-3 I.R.B. 320, 321 n.2. This minor revision to proposed Form 2 would obviate the need to make clarifying allegations in responsive pleadings to ensure that the correct determination notice is properly in suit.

Thank you again for this opportunity to comment on the proposed amendments to the Rules of Practice and Procedure. Please do not hesitate to contact me if you require additional explanations or comments with respect to the foregoing. In addition, I and my staff are available to meet with the court and representatives of the bar to discuss any of the proposals in more detail.

Sincerely,

Deborah A. Butler
Associate Chief Counsel
(Procedure & Administration)

cc: Christopher S. Rizek, Esquire
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TAXATION
A Section of the American Bar Association

March 7, 2011

Mr. Robert R. Di Trolio
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Re: Proposed Amendments to the Rules of the United States Tax Court

Dear Mr. Di Trolio:

On behalf of the Section of Taxation ("Section") of the American Bar Association, the following comments are provided in response to the invitation for public comments issued by the United States Tax Court (the "Court") with respect to proposed amendments to the Court's Rules of Practice and Procedure announced on December 20, 2010.[1] The proposed amendments include amendments concerning timing for filing summary judgment motions, Rule 155[2] computations, motions regarding elections to proceed under the small tax case procedure, answers in lien and levy cases, and recognition of mediation as a form of alternative dispute resolution. These comments have not been approved by the House of Delegates or Board of Governors of the American Bar Association and, accordingly, they should not be construed as representing the position the American Bar Association.

Discussion

The Section commends the Court on the proposed amendments to its Rules[3] and endorses the Court's efforts to provide clarity with regard to its procedures and promote efficiency in case administration and resolution. The amendments proposed on December 20, 2010, include modifications and clarifications of several of the Court's discovery rules, timing and filing rules, and the rules regarding alternative dispute resolution. We believe that these proposed amendments further the Court's efforts in achieving expeditious and balanced review of tax disputes, while taking into account the varying nature of the taxpayers that appear before the Court and the types and sizes of cases that the Court hears. The following comments summarily reflect the Section's understanding of how the new provisions work, why they are necessary, and/or the problems they seek to address, as well as issues and suggestions that may assist the Court in refining the proposed amendments.

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1 Principal responsibility for these comments was exercised by Christopher S. Rizek, Chair of the Section's Committee on Court Procedure and Practice (the "Committee"). Substantive contributions were made by Mark D. Allison, Mitchell Horowitz, Sheldon Kay, Peter A. Lowy, Rachel Partain, Robert D. Probasco, and Zhanna A. Ziering, of the Committee. These comments were also reviewed by Kevin L. Kenworthy on behalf of the Section of Taxation's Committee on Government Submissions and by Thomas J. Callahan, the Section's Council Director for the Committee.

2 All Rule references are to the Tax Court Rules of Practice and Procedure.

3 *See* December 20, 2010, Tax Court Press Release announcing the proposed amendments, *available at*: http://www.ustaxcourt.gov/press/122010.pdf.

Recognition of Law Students Assistance

Proposed Rule 24

The Section commends the Court for confirming that law students may participate in proceedings before the Court, provided they are supervised by an admitted attorney and receive the Court's permission. The proposed amendment should further encourage such student participation, which at the same time benefits *pro se* taxpayers. In addition, the law students who receive this opportunity will obtain valuable, hands-on experience, and the academic clinics as well as the Office of Chief Counsel student practice program, which in part depend upon this practice to attract high-quality interns, will also benefit from the confirmation of this procedure.

The Court also proposes to make changes to Rule 24(f), which would require counsel for a former representative, fiduciary, or party, desiring to withdraw such counsel's appearance to file a motion to withdraw. This proposal aligns Rule 24(f) with Rule 24(c). The Section agrees with the proposed amendment.

Lien and Levy Actions

Proposed Rules 36, 37, and 333

The Section agrees with and supports the Court's efforts to expedite lien and levy actions by reducing time periods for various filings. Rule 36 currently provides the Commissioner 60 days after service of the petition to file an answer or 45 days to file a motion with respect to the petition. Rule 37 currently provides the petitioner 45 days after service of the answer to file a reply or 30 days to file a motion with respect to the answer. The proposed amendment to Rule 333 would reduce all of these time periods to 30 days. The proposed changes would require both parties to move the case forward quickly in the preliminary stages.

The Section is unsure, however, whether the proposed time period for filing an answer would be sufficient as a practical matter. We believe 30 days should be sufficient if the Internal Revenue Service (the "Service") Chief Counsel attorney who is assigned the case receives the administrative file immediately, but, in our experience, that does not always occur. We also believe the time period within which to file an answer should be short enough to maintain pressure for expedited processing, including transmittal of the administrative file to counsel, but long enough to minimize the need for motions to extend the time to file the answer. It is unclear to us whether the proposed 30 day period is optimal and we encourage the Court to evaluate the proposed Rule carefully in light of input from the Service's Office of Chief Counsel.

Calendars

Although not part of the proposed Rules themselves, the notice of proposed amendments also requested comments on the use of supplemental calendars for lien and levy actions. Our comments are based on the following understanding of the proposal and further clarification may be helpful if we did not fully understand the proposal.

It appears that the Court is considering the use of two calendars for each trial session – the normal trial calendar and a supplemental calendar for lien and levy actions. Cases are usually calendared five months before the scheduled trial session, but the Court may issue supplemental calendars, for lien and levy actions only, closer to the date of the trial session. When an answer was filed less than five months before the next scheduled trial session, this use of supplemental calendars would allow a lien or levy action to proceed to trial at the next scheduled session rather than waiting until a later session.

The Section agrees that lien and levy actions generally may be calendared with less lead time than five months and believes that issuing a supplemental calendar three months before a trial session would likely provide sufficient time. As the Court points out, that would permit at least 30 days after the filing of the answer within which to file a summary judgment motion. As with proposed Rule 333, this change would contribute to resolving lien and levy cases on an expedited basis. *Pro se* taxpayers or taxpayers represented by tax clinics, who may not be as adept with the Tax Court Rules, may need additional time. In such cases, the Court might consider leniency and flexibility with respect to motions for continuance or other scheduling requests.

The Section encourages the Court to also consider either: (a) establishing a separate, rather than supplemental, trial calendar solely for lien and levy actions; or (b) placing all lien and levy actions on a small case calendar, regardless of whether a lien or levy action would otherwise constitute a small case. We believe that establishing a separate calendar for small cases, rather than including them on the same calendar with regular cases, has improved efficiency for both the parties and the Court. Establishing a separate calendar for lien and levy actions, or including them on a small case calendar, would likely provide similar benefits. Ideally, the process would be flexible enough to allow different solutions for different locations or some variation over time, depending on the volume and type of cases docketed. Although Congress intends that lien and levy actions be resolved on an expedited basis,[4] a separate calendar for such cases might be implemented without detracting from, and in fact might complement, that objective.

Motions and Motion Calendars

Proposed Rule 50

The Section commends the Court for formally recognizing that motions may be heard at trial sessions in all of the Court's places of trial. The proposed amendment to Rule 50(b)(2) is consistent with the Court's current practice and the Court's ongoing efforts to promote efficiency in case administration and litigation and to reduce costs and delays associated with such litigation. The Section suggests that the Court also consider formally encouraging telephonic hearings on motions when practical. Telephonic hearings on motions are consistent with the Court's current practice and further effectuate the Court's efforts in promoting efficiency and reducing costs with respect to its proceedings. The ability to participate telephonically in a hearing on a motion further reduces litigation costs and mitigates delays inherent in the coordination of practitioners' schedules. Although we understand that a telephonic hearing may not be appropriate when, for example, live testimony or issues of admissibility are anticipated, we believe a formal encouragement of telephonic hearings on motions in appropriate circumstances would be a valuable addition to the Rules.

Proposed Rule 130

The Court also proposes to make conforming changes to Rule 130 in conjunction with the proposed amendment to Rule 50(b)(2). The Section does not have any specific comments with respect to this proposed amendment, other than the general comments expressed above.

Completion of Discovery

Proposed Rule 70

The Section agrees with the Court's proposed amendments to Rule 70(a)(2). The proposed amendments to the rule provide welcome clarifications, explaining that the 45-day limit on discovery motions applies to all discovery-related motions in addition to motions to compel. The proposed

[4] *See* H.R. REP. NO. 105-599, at 263-67 (1998) (Conf. Rep,); S. REP. NO. 105-174, at 67 (1998).

amendments are consistent with practitioners' general understanding of the limitations contained in Rule 70(a)(2). Nevertheless, the Section commends the Court for proposing to amend the Rule to remove any uncertainty with respect to the Rule and prevent any potential misunderstandings in its application.

Depositions

Proposed Rule 74

The Section commends the Court for proposing to amend Rule 74(a) to clarify the differences between the Court's procedures regarding depositions for discovery purposes and those regarding depositions to perpetuate evidence. The Section also agrees with the Court's conforming amendment to Form 15, Application for Order to Take Deposition, clarifying that Form 15 should only be used to obtain a deposition to perpetuate evidence. The proposed amendments are consistent with practitioners' general understanding of the Court's deposition procedures. However, the Section welcomes the proposed amendments and believes that such amendments would provide clarity with respect to the appropriate deposition procedures and remove any possibility of misunderstanding with respect to this issue.

Stipulations for Trial

Proposed Rule 91

The Section understands and appreciates the Court's desire to conform Rule 91(a)(2) with the effects of admissions provided by Rule 90(f). The stipulation process provided by Rule 91 is the "bedrock" of the Court's practice. Discovery and requests for admission are often useful tools to obtain information or agreements that may aid the stipulation process. Rule 90 requires parties responding to requests for admissions to specifically admit or deny, in whole or in part, to assert that the requests cannot be truthfully admitted or denied, with detailed reasons, or to object to responding by stating in detail the reasons therefore. The Rule further provides that a party may not respond with lack of information or knowledge as a reason for failure to admit or deny unless the party states that it has made reasonable inquiry and that the information known or readily obtainable is insufficient to enable the party to admit or deny.

Rule 90(f) defines the effects of an admission. This Rule states that "any matter admitted under this Rule is conclusively established unless the Court on motion permits withdrawal or modification of the admission." This Rule is potentially in conflict with Rule 91(a)(2), which provides that any "matter obtained through [admissions] which is within the scope of subparagraph (1) **must** be set forth comprehensively in the stipulation, in logical order and the context of all other provisions of the stipulations." (Emphasis added). The Court proposes to change "must" to "should."

The Court has proposed this change to eliminate the possible conflict between Rules 90(f) and 91(a)(2). The Section recognizes the possible conflict but, for the reasons set forth below, suggests the following changes to the proposed amendment of Rule 91(a)(2).

An issue may arise under Rule 91(a)(2) when a party inadvertently omits an admission from the stipulation. If the Court wishes to address the possible effects of the inadvertent omission of an admitted fact, Rule 91(a)(2) might be modified by stating:

> A failure to include in the stipulation a matter admitted under Rule 90(f) does not affect the Court's ability to consider such admitted matter.

Further, the Court's proposed replacement of "must" with "should" in proposed Rule 91(a)(2) would change a "requirement" to stipulate to admitted matters into what would arguably be a "laudable goal" of stipulating to admitted matters. The change from "must" to "should" might provide parties with an argument that they are not required to stipulate to previously admitted matters. The Section suggests

that the Court consider this potential misinterpretation in view of the meritorious objective reflected in the proposed amendment to Rule 91(a)(2).

Deadline for Summary Judgment Motions

Proposed Rule 121

The Section agrees with the proposed amendment to Rule 121(a), which requires that motions for summary judgment be filed no later than 60 days before the first day of the Court's session at which the case is calendared for trial. The Section believes that the change would allow the parties to better utilize their resources in preparing to litigate only those issues that would actually be tried, and disposing of other issues by summary judgment, so long as 60 days is sufficient time for the Court to fully address the matters raised in such motions. However, the Section suggests that the Court consider adding language to proposed Rule 121(a) providing for circumstances in which the Court determines that 60 days is not sufficient time to rule on these motions. In such cases, we believe the Court should consider allowing for a continuance of trial or extending the 60-day limit.

Mediation

Proposed Rule 124

The Section endorses the Court's decision to change the title of this rule to remove the emphasis on arbitration, and to expand the scope of the rule to incorporate more fully various methods of alternative dispute resolution, particularly voluntary non-binding mediation. The Court acknowledges that voluntary binding arbitration has been used in only a few instances over the past 20 years. We believe highlighting mediation as an alternative means of dispute resolution should make the availability of this alternative in the Court better known to practitioners, who generally would have matters in federal district court and state court routinely referred to mediation.

With respect to Rule 124(a), the Section recommends that the Court clarify that the motion to resolve a factual dispute through voluntary binding arbitration may be made after the case is at issue, as determined by Rule 38.

With respect to proposed Rule 124(a)(2) and (3), the Section recommends that the Court require that the proposed stipulation of the parties, as well as the Court Order, specify the type of arbitration to be utilized (*e.g.*, baseball arbitration, in which the parties present their respective facts, and the arbitrator must select one version or the other, or arbitration in which the arbitrator has the discretion to reach his or her own conclusion on the facts, even if not a resolution advocated by the parties).

With respect to Rule 124(a)(4), the Section believes that the Court should expand the scope of the Report by the Parties to require that the parties also provide a Stipulation as to any and all issues resolved in the binding arbitration, so that the effect of that resolution may be incorporated into the case in chief.

With respect to Rule 124(b), the Section endorses the Court's greater emphasis on voluntary non-binding mediation in the context of Tax Court cases. Particularly when a case is set for trial before meaningful negotiations occur with the Service's Office of Appeals, mediation may provide another means by which the parties may seek to settle without the need for trial. As taxpayers may be unfamiliar with the Court's Rules, the Section believes it might be helpful if the Court reminds taxpayers of the availability of mediation in its pre-trial orders and provides a time frame in the orders during which a motion may be brought prior to the scheduled trial date.

With respect to Rule 124(c), the Section endorses the Court's emphasis on other methods for the parties to resolve their cases voluntarily.

Deadlines for Rule 155 Computations

Proposed Rule 155

We commend the Court for establishing deadlines for filing computations for entry of decision in accordance with an opinion of the Court. We agree that providing a deadline in the Rule is a more efficient approach than requiring the Court to issue an order and we hope that this change will result in faster case resolutions.

We recommend, however, a clarification of proposed Rule 155(b) concerning the procedure in absence of agreement. The next-to-last sentence of proposed Rule 155(b) states:

> The Clerk will serve upon the opposite party a notice of such filing and if, on or before a date specified in the Clerk's notice, the opposite party fails to file an objection, accompanied or preceded by an alternative computation, then the Court may enter decision in accordance with the computation already submitted.

We believe a standard procedure to request objections is appropriate when only one party files a computation. If both parties file computations, however, in most cases the initial submissions explain the differences between the two computations. The Court may address those instances in which the nature of the disagreement is not adequately explained in the parties' initial submissions by affording the parties an opportunity to present arguments, as described in the last sentence of proposed Rule 155(b). As proposed, however, Rule 155(b) might be interpreted as requiring a formal objection to avoid an automatic decision for the other party, even when a party has already filed its own computation. Therefore, we suggest that the Court consider replacing the sentence quoted above with the following:

> If only one party files a computation, the Clerk will serve upon the opposite party a notice of such filing and specify a date for filing an objection accompanied by an alternative computation. If, on or before that date, the opposite party fails to file an objection, then the Court may enter decision in accordance with the computation already submitted.

Removal of Small Tax Case Designation

Proposed Rule 171

The Section supports the Court's restructuring of Rule 171 in light of the requirement reestablished in 2007 that the respondent file answers in all small tax cases. The Section also agrees that, in light of this requirement, reinstituting a provision substantially similar to old Rule 172(b) makes sense. However, the Section recommends that a few aspects of proposed Rule 171 be clarified.

First, with respect to Rule 171(c), the Section believes that if, after filing the petition, a petitioner wants to have the case conducted under the small tax case procedures, the petitioner's request should be in the form of a motion, and the time in which the respondent must submit any opposition to that motion should be specified (similar to the requirement in Rule 171(b)). Further, we recommend that the Court consider whether a petitioner may request to have the case considered under the small tax case procedures after the case has been set for trial at a trial session.

Second, with respect to Rule 171(d), the Section believes that the proposed language is confusing as to whether "such request" is referring to a request under Rule 171(a), Rule 171(c), or both. The Section also believes that Rule 171(d) should define "a party" who may file a motion opposing the designation as a small tax case because it appears that the term "party" is intended to extend beyond a petitioner and the respondent. For instance, in an innocent spouse case, is the non-petitioning spouse who has filed a notice of intervention considered a "party" who may file a motion to change the small tax case

designation? The Section believes that such a clarification would assist the Court in not having to address multiple motions to oppose the designation.

Other

Proposed Rules 10 and 20

The Section agrees with the proposed changes to Rules 10(d) and 20(c), which align the Rules with general federal court practices and conform the Rules with the Federal Rules of Civil Procedure and the Court's practice.

Proposed Rules 12, 22, 150 and 151

The Section agrees with the Court's proposed amendments to Rules 12(a), 22, 150(a), and 151, which insert references to Special Trial Judges.

***

As we noted at the outset, the Section commends the Court on the proposed amendments to its Rules. The Section believes that the Court's ongoing efforts to promote efficiency, reduce costs, and make the Court as user-friendly as practicable are laudable and appropriately effectuate the Court's objectives to achieve expeditious and balanced review of tax disputes, while remaining mindful of the varying nature of taxpayers that appear before the Court and the types and sizes of cases that the Court hears.

Questions regarding these comments may be directed to Christopher Rizek at crizek@capdale.com or (202) 862-8851. Thank you for your consideration.

Sincerely,

Charles H. Egerton
Chair, Section of Taxation

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February 1, 2011

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Re: Comments on Proposed Rule Changes in Press Release of December 20, 2010

Dear Mr. Di Trolio:

This letter is submitted as a joint comment from the undersigned invited by the Court in its December 20, 2010 press release proposing Rules changes.

We recently published an article in Tax Notes and Tax Notes Today entitled "Tax Court Collection Due Process Cases Take Too Long", 130 Tax Notes 403 (Jan. 24, 2011), 2011 TNT 16-20 (Jan. 25, 2011) . In that article (which Judge Colvin saw in draft), we suggested several changes to the Tax Court rules and procedures to speed up Collection Due Process ("CDP") cases in the Court. We assume that the Court already considered our suggestions in the article before proposing its changes, so do not repeat them here.

However, we wish to comment on the changes that affect CDP that the Court did propose in its press release.

First, the Court proposed amending Rule 121 to state that, without leave of the Court, motions for summary judgment may not be filed later than 60 days before the start of the trial session at which the case is calendared for trial. We think this is a salutary rule, as, in our study of Tax Court CDP cases, we found some motions for summary judgment filed later, leading, typically, to their being scheduled for oral argument at the calendar call. Leaving the motion to be argued then left the parties unsure whether there would be a trial, and thus, they had to prepare for trial anyway. We think this new proposal will both reduce the burden on the Court and parties and lead to the earlier filing of any such motions.

In connection with this proposal, the Court stated that it:

> is considering issuing supplemental calendars for [CDP] . . . actions within 5 months of the trial sessions, and the Court requests comments on the issuance of these supplemental calendars in addition to the proposed Rules amendments. . . . If th[e summary judgment rule] amendment is adopted, and if the Court issues supplemental calendars 3 months before a trial session, there will be at least 30 days remaining after the filing of the answer within which to file a summary judgment motion.

From what we understand, the Court is considering scheduling CDP cases for trial immediately upon their becoming at issue. Cases typically become at issue upon the filing of the answer. Rule 38. Summary judgment motions are currently permitted to be filed, at the earliest, 30 days after the case is at issue. Rule 121(a). CDP cases would either be (1) put on the next calendar for the requested city for which a notice of calendaring was about to go out (it is usually sent 5 months before the trial calendar) or, (2) if a notice has already gone out, added to that calendar through a "supplemental calendar", so long as there were 3 months (about 90 days) left before the calendar begins.

We think the idea of placing CDP cases newly at issue on trial calendars on an expedited basis as the Court proposes is generally an excellent way to speed their resolution. However, we think the three-month time window before the calendar is too short for those few CDP cases in which the parties legitimately need time to do discovery. Under the Court's opinion in Robinette v. Commissioner, 123 T.C. 85 (2004), rev'd 439 F.3d 455 (8th Cir. 2006), a CDP "appeal" in the Tax Court is a trial de novo limited to issues raised in the CDP hearing at Appeals. Thus, a party in a Tax Court CDP proceeding may legitimately wish to employ discovery in anticipation of a trial which may have a broader record than that created at Appeals.

For example, in a CDP case in the Court just last year, Professor Smith sought discovery from the IRS going to whether the notice of deficiency underlying the assessment was sent to the taxpayer's last known address. This was in an appeal of a CDP lien hearing under section 6320, where the taxpayer contended that her identity had been stolen and a phony return had been filed by someone else using a different address to get an earned income tax credit refund. Professor Smith sought the addresses used on notices preceding the notice of deficiency and information concerning whether the envelopes containing those notices were returned as undeliverable – with a view toward determining whether the IRS knew or should have known that the taxpayer did not live at the address for her used on the notice of deficiency. After waiting the required 30 days after the case was at issue to commence discovery; Rule 70(a)(2); Professor Smith first issued informal discovery under Branerton, and allowed the IRS 30 days to respond. Several days after the 30 days lapsed, Professor Smith correctly concluded from the IRS' silence that the IRS was not going to respond to the informal discovery. Accordingly, he mailed out formal discovery seeking the same information and items. On the 30th day after issuing formal discovery, the IRS mailed him its responses, which he did not get to see for four days because the responses came by mail. Had he reviewed the responses

and thought them insufficient, he would have had to move for an order to compel responses at least 45 days before the beginning of the calendar call because discovery must be completed "no later than 45 days prior to the date set for call of the case from a trial calendar." Id. Under the most expedited basis proposed, therefore, under the Tax Court's current rules, discovery would ordinarily be infeasible if it is to be commenced no sooner than 30 days after, but completed no later than 45 days after, the case is at issue – the situation that would occur if a CDP case were placed on a trial calendar to take place merely 90 days after the case became at issue.

While discovery in CDP cases is unusual, it is not only done by taxpayers: Our study found one instance where, in a CDP case, the IRS did discovery and had to move to compel responses. See John W. & Kimberly A. Siebert, Docket No. 1240-08L.

We do not propose moving back the calendaring of all CDP cases to allow more time for discovery for merely a few CDP cases. Since we recognize that CDP discovery is rare, we suggest an amendment to Rule 70(a)(2) that would have a party whose CDP case was set for a trial session that would occur fewer than five months after it was at issue, and who wanted to do discovery, to file with the Court, within 14 days of the notice from the Clerk's Office that the case was set for such trial session, a motion identifying the discovery desired and proposing a timetable for such discovery. The Court might grant the motion, set times for discovery, and, in connection therewith, probably continue the case to the next trial calendar for that city.

The other major CDP proposal in the Court's press release is a proposed amendment to the Rules to require respondent to move or file an answer within 30 days after a CDP petition is filed. Although we did not propose this idea, we think it is a good one if the IRS attorneys can obtain from the IRS in that shorter time period the necessary files to prepare the answer. We leave it to IRS management to respond to this proposal and to indicate whether this time period is feasible. If it requires some changes to internal IRS procedures on handling its files to meet the shorter time period, the IRS should be asked to make those changes.

Sincerely,

T. Keith Fogg

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February 24, 2011

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Re: Comments to the Proposed Amendments to Rules of Practice and Procedure

Dear Mr. Di Trolio:

I am pleased to respond to Chief Judge John O. Colvin's request for comments on the proposed amendments to the Tax Court Rules of Practice and Procedure. In a Press Release dated December 20, 2010, Chief Judge Colvin invited public comment to the proposed amendments regarding a variety of issues, to be received by the Court by March 7, 2011. I am specifically commenting on those amendments found in Title XXXII that impact the cases that arise from the Collection Due Process determination letters with regard to lien and levy actions under IRC sections 6320(c) and 6330(d).

Lien and Levy Actions

Congress granted this Court exclusive jurisdiction to review the IRS' determinations in lien and levy actions.[1] A taxpayer may submit a request to the Internal Revenue Service ("IRS") for a Collection Due Process hearing upon receipt of a final notice of a lien or levy action. The taxpayer has 30 days to request said hearing, which is then conducted by an IRS Appeals officer, generally by telephone. Assuming the action is not settled at this point, a Notice of Determination is issued by the IRS and the taxpayer has 30 days to file a petition in the U.S. Tax Court, or the collection activity will quickly resume. As noted by the Court, this 30 day time period for a taxpayer to file a Petition, as compared to the customary 90 day time period to file a Petition in other types of actions, indicates Congress' intent that proceedings in lien and levy actions should be handled on an expedited basis.

Expedited Timeline

To further this legislative intent and as included in the proposed amendments, Rule 333 shortens certain response dates to 30 days. The amended Rule 333 would require the Commissioner to file an answer, or motion with respect to the petition, within 30 days from the

[1] Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L.105-206, sec. 3401, 112 Stat. 746; Pension Protection Act of 2006, Pub. L. 109-280, section 855(a), 120 Stat. 1019.

date of service of the petition. Similarly, petitioner would have 30 days from the date of service of the answer in which to file a reply or motion with respect to the answer.

Compressing the filing dates to 30 days for each new action will expedite the review process, but only if the Court also follows through on its suggestion[2] to calendar these cases quickly, and to add special calendars for lien and levy cases. The Court states in the above referenced Press Release that it is considering issuing supplemental calendars for the lien/levy cases within five months before already scheduled trial sessions. I agree that expedited calendaring of the cases is essential to fulfill the legislative intent that lien and levy cases be resolved quickly. The rights of the parties would be protected in that the case would not be calendared for trial unless at least 60 days remain prior to the beginning of the court session to allow either party the opportunity to file a summary judgment motion, as set forth in the proposed amendment to Rule 121. The Court could also make expanded use of bench trials and decisions, pursuant to Rule 152, to further expedite the process.

It has been my experience that the vast majority of these cases are settled just prior to trial. It has also been my experience, both as an attorney in Chief Counsel's office and as an attorney in private practice, that docketed cases do not gain the attention of the Internal Revenue Service until the deadlines are looming. Thus, quickly calendaring these cases will force the Commissioner, petitioners, and all attorneys to handle lien and levy cases in a timelier manner. This more efficient schedule will benefit taxpayers in that the accumulation of interest as the case is pending will be minimized. The expedited schedule should also benefit the Commissioner and further his goal of efficiently collecting taxes.

Eliminate Requirement of a Reply

One suggestion to further expedite this process would be to follow the Small Tax Case rules and remove the requirement that a reply be filed in response to the Commissioner's answer. Thus, the language in Rule 173(**c**) could be referenced or adopted within Title XXXII:

> **Reply:** A reply to the answer shall not be filed unless the Court otherwise directs. Any reply shall conform to the requirements of Rule 37(b). In the absence of a requirement of a reply, the provisions of the second sentence of Rule 37(c) shall not apply and the affirmative allegations of the answer shall be deemed denied.

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[2] *See* Notice of Proposed Amendments to Rules, pages 7-8.

Dismissal for Default

If the Commissioner fails to meet any of these deadlines for filing the answer or defending the docketed case, it should be clear that the case will be dismissed in favor of the petitioner. This means that the lien would be immediately removed from the petitioner's property and/or the levy action would be dismissed. Accordingly, collection efforts against the petitioner would be discontinued for the taxes set forth in the Notice of Determination. The provisions regarding the default of any party that are outlined in Rule 123(a) and Rule 123(d) could be expanded to specifically include lien/levy actions. Additionally, Rule 123(b) could be amended to include language addressing a failure of the IRS to comply with the shorter time periods in lien/levy actions. For example, Rule 123(b) could be amended as follows, with the amended language underlined:

> **Rule 123(b) Dismissal**: For failure of a party properly to prosecute, to defend, or to comply with these Rules or any order of the Court or for other cause which the Court deems sufficient, the Court may dismiss a case at any time and enter a decision against the party which failed to prosecute, defend, or comply with these Rules. The Court may, for similar reasons, decide against any party any issue as to which such party has the burden of proof, and such decision shall be treated as a dismissal for purposes of paragraphs (c) and (d) of this Rule.

Equitable Review by Tax Court

Pursuant to IRC §6330(c)(3)(C), an impartial IRS Appeals Officer is tasked with reviewing the collection actions of the IRS to ensure that the "proposed collection action balances the need for the efficient collection of taxes with the legitimate concern of the person that any collection action be no more intrusive than necessary." The Tax Court is then given jurisdiction in IRC §6330(d) to review the actions of the Appeals Office, including a review of their determination with regard to this equitable balancing test. Thus, the Court has jurisdiction to balance the collection action with the taxpayer's legitimate concern that the IRS not be more intrusive than necessary. Presumably this would include a situation in which the IRS is threatening to seize property with little resale value, and thus the seizure would have minimal impact on reducing the taxpayer's tax deficiency. It is possible that such action would impact the taxpayer disproportionately. The Court has the rare opportunity to provide equitable relief for the taxpayer, where warranted. Since the United States Tax Court is not generally a court of equity, I suggest adding a sentence to Rule 331(b) to emphasize this statutory authority. It is essential that the record include factual information that will enable the Court to make an

informed and equitable decision. Thus, I suggest that Rule 331(b)(5) be amended as follows: (underlined language is added)

> Rule 331(b)(5): Clear and concise lettered statements of the facts on which the petitioner bases each assignment of error, <u>including facts that bear on whether the collection action, or proposed collection action, has been no more intrusive than necessary.</u>

These reforms are welcome, and should help to expedite lien and levy cases. Any efforts on the part of the Court to minimize the time the cases are pending with the Court would also be beneficial to taxpayers and to an efficient tax administration. Thus, if the Court adds these cases to supplemental calendars, and if the Court could render bench opinions on the litigated cases when possible, the delays inherent in this process will be minimized and the legislative intent of expediting lien and levy actions will have been achieved.

Thank you for the opportunity to provide comments to these proposed amendments.

Sincerely yours,

JACKSON & CAMPBELL, P.C.

Nancy Ormeyer Kuhn

DEPARTMENT OF THE TREASURY
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OFFICE OF
CHIEF COUNSEL

MAR 1 2011

The Honorable John O. Colvin
Chief Judge
United States Tax Court
400 Second Street, N.W.
Washington, D.C. 20217

Reference: Public disclosure of non-party taxpayer identifying information in whistleblower award appeals under section 7623(b)(4)

Dear Chief Judge Colvin:

We write to bring to the court's attention our concerns with the ongoing and increasing public disclosure of non-party taxpayer identifying information in whistleblower award appeals petitioned pursuant to I.R.C. section 7623(b)(4). The National Taxpayer Advocate in her 2010 Annual Report to Congress as well as certain members of the private bar have raised similar concerns regarding these public disclosures that are occurring without the non-party taxpayer's knowledge or consent. We urge the court, in addressing this issue, to consider developing and proposing amendments to the court's Rules of Practice and Procedure and, ultimately, to adopt practical and effective rules that address this issue at the commencement of the litigation to minimize or eliminate public disclosures of taxpayer identifying information in whistleblower award appeals. We stand ready to assist the court in this process, whether by meeting to discuss the issue with the court and other stakeholders, recommending specific amendments to the court's Rules, commenting on proposed amendments, or by other means amenable to the court.

Section 7623(b)(4) confers jurisdiction on the court over appeals from whistleblower award determinations made under sections 7623(b)(1), (b)(2), or (b)(3), with respect to information provided to the Internal Revenue Service on or after December 20, 2006. The Service does not include taxpayer identifying information in a determination notice issued pursuant to section 7623 and the Service does not intend to do so in the future. Nonetheless, petitioners routinely disclose taxpayer identifying information in petitioning the court under section 7623(b)(4). Thereafter, the public disclosure of taxpayer identifying information in most docketed cases only intensifies.

In connection with the court's October 3, 2008, adoption of amendments to the Rules of Practice and Procedure regarding whistleblower award appeals, the court explained generally that hearings before the Tax Court are open to the public and that evidence received by the court is open to public inspection, citing sections 7458 and 7461. The court further explained that these statutory provisions, Rule 103, and related case law provide authority for the court to permit a petitioner to proceed anonymously and seal the record in an appropriate case, but do not require the court to permit all petitioners in whistleblower appeals to proceed anonymously or require the court to seal the record in all such cases. We agree both with the court's implicit recognition of the public's right to access to judicial proceedings and with the court's approach of addressing, on a case-by-case basis, whether to permit a petitioner in a whistleblower case to proceed anonymously or whether to seal the record in such a case.

As noted, the public disclosure of non-party taxpayer identifying information in whistleblower award appeals typically begins with the filing of the petition. Accordingly, we recommend that the court consider developing rules applicable to petitions filed pursuant to section 7623(b)(4) and Rule 341, as well as to subsequent filings in such award appeals, that require the filing party to redact taxpayer identifying information such as names, taxpayer identification numbers, and addresses. We recognize, however, that these limited redactions may not be sufficient in every case to prevent the disclosure of a particular taxpayer's identity or other specific and sensitive taxpayer information. We further recognize that the court and the parties are not best-positioned to, and may not always be able to, determine the extent of the redactions necessary to prevent these types of disclosures. In that regard, it may be advisable for the court to solicit input from the public and the stakeholders to these fledgling causes of action, and to consider whether and in what way non-party taxpayers should or could be included in a redaction process or be afforded some other opportunity to protect their own identifying or sensitive information.

We thank you for your consideration of this issue and your consideration of our concerns and, again, stand ready to assist the court to develop rules aimed at preventing unnecessary public disclosures of non-party taxpayer identifying information. Please do not hesitate to contact me if you have any questions or comments regarding the foregoing.

Sincerely,

Deborah A. Butler
Associate Chief Counsel
(Procedure and Administration)

cc: Christopher S. Rizek, Esquire
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March 1, 2011

Robert R. Di Trolio, Esq.
Clerk of the Court
U.S. Tax Court
400 Second St. NW, Room 111
Washington, DC 20217

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

Dear Mr. Di Trolio:

On December 20, 2010, the United States Tax Court proposed amendments to the Tax Court Rules of Practice and Procedure and provided the public until March 7, 2011 to provide comments. In light of the Tax Court's request for public comments on the Proposed Tax Court Rules, I would like to take this opportunity to comment on the need for additional rules with respect to Title XXXIII, Whistleblower Actions. Although there are existing Tax Court Rules under this Title, I would encourage the Court to give consideration to adding additional rules in whistleblower cases to shield confidential third-party return information from disclosure.

Section 7803(c)(2)(A) of the Internal Revenue Code directs the National Taxpayer Advocate to identify taxpayer problems and to propose administrative and legislative recommendations to mitigate those problems. One of our core priorities is the protection of taxpayer rights, including the right to privacy.

Section 6103 of the Internal Revenue Code generally protects return information from disclosure. This general rule against disclosure is subject to certain exceptions, including an exception in judicial tax proceedings. See IRC § 6103(h)(4). Thus, a taxpayer who is considering whether to request judicial review of an administrative finding has an opportunity to weigh the advantages of judicial review against any disadvantages associated with the public disclosure of information that ordinarily becomes part of the case file and the public record in a Tax Court case. Under some circumstances, taxpayers may choose not to pursue judicial remedies in order to preclude public access to their personal or business information.

In a whistleblower case, by contrast, the taxpayer who is the subject of the claim is not a party and has no control over what information is presented by the whistleblower or included in the case file or opinion. A whistleblower case begins when a whistleblower approaches the IRS alleging that a third-party taxpayer has underpaid tax. The IRS generally conducts a preliminary review of the information the whistleblower provides and then decides whether or not to pursue the claim. If the IRS chooses to pursue the claim, it does not inform the taxpayer that a whistleblower is involved. Indeed, the taxpayer may never learn about the existence of the whistleblower.

If the whistleblower is not satisfied with the IRS's award determination and files an appeal with the Tax Court under IRC § 7623(b)(4), the Tax Court may issue an opinion regarding the whistleblower's claim that contains personal or business information about the taxpayer who is the subject of the whistleblower claim, yet that taxpayer may not know about the proceeding or have an opportunity to request redaction of the personal or business information included in the case file or opinion.

In *Cooper v. Comm'r*, 135 T.C. No. 4 (July 8, 2010), for example, the name, amount of alleged underpayment, and other identifying information about a taxpayer were published in a whistleblower case. The taxpayer was neither a party to the case nor subject to any deficiency asserted by the IRS.

In my 2010 Annual Report to Congress, I recommended that Congress enact legislation to require redaction of the administrative record and any judicial review of a whistleblower proceeding to protect names, addresses, identifying details, trade secrets, commercial or financial information, and other information that, if disclosed, "would constitute a clearly unwarranted invasion of personal privacy" of the third-party taxpayer. *See* National Taxpayer Advocate 2010 Annual Report to Congress 396-399 (Legislative Recommendation: *Protect Taxpayer Privacy in Whistleblower Cases*). A copy of that section of my report is enclosed

As a practical matter, I believe the Tax Court may be able to protect the privacy of the subject of a whistleblower claim by amending its rules to provide for appropriate redaction. IRC § 7461(b)(1) authorizes the Tax Court to "make any provision which is necessary to prevent the disclosure of trade secrets or other confidential information," while Tax Court Rules 27 and 103 allow a request for redaction of information for good cause or a protective order over a trade secret or other information that justice requires to protect a person from embarrassment. If a third party does know of the case, the Tax Court has allowed third parties to intervene to protect an otherwise unrepresented interest, which here would be the third-party taxpayer's privacy rights. *See, e.g., Estate of Smith v. Comm'r*, 77 T.C. 326, 334 (1981). Thus, the Tax Court may be able to codify third-party taxpayer privacy rights within a rule applicable to whistleblower actions.

I appreciate your consideration of these concerns and would be happy to discuss this matter further if it would be helpful to the Court.

Sincerely,

Nina E. Olson
National Taxpayer Advocate

Enclosure