Department of the Treasury **Internal Revenue Service** **Office of Chief Counsel**

Notice

CC-2010-003

December 2, 2009

Subject: Amendments to United States Tax Court Rules of Practice and Procedure

Cancel Date: Upon incorporation into CCDM

BACKGROUND

On September 18, 2009, the U.S. Tax Court adopted amendments to its Rules of Practice and Procedure. The text of the amendments can be found on the Tax Court's website at http://www.ustaxcourt.gov/notice.htm, and a press release explaining the amendments is available at http://www.ustaxcourt.gov/press/091809.pdf. The amendments to the Rules are generally effective as of January 1, 2010, except that the amendment to Rule 11 regarding credit card payments is effective immediately, as are the amendments to Forms 5, 10, and 13. The most significant changes are to the following eight categories: ownership disclosure statements, service of papers, limitation on the number of interrogatories, depositions for discovery purposes, electronically stored information, contemporaneous transmission of testimony from different location, disciplinary matters, and payment of Tax Court fees and charges by credit card. Other amendments make conforming changes to a number of the court's existing rules as well as to a number of the forms in Appendix I to the rules. Some of the changes are significant and represent the Tax Court's attempt to conform its Rules more closely to selected procedures from the Federal Rules of Civil Procedure, especially in the discovery process.

On November 20, 2009, the Tax Court announced that it had adopted an amendment to its rules authorizing the filing of documents by electronic means in all Tax Court cases. See http://www.ustaxcourt.gov/press/112009.pdf. New Rule 26 is to be effective January 1, 2010. The court further announced a proposal to require eFiling for most represented parties and requested comments on the proposal by December 21, 2009. Formal comments from our office will be provided to the court by that date. Additionally, a Chief Counsel Notice will be issued in the near future with specific instructions regarding eFiling, eService, and the eAccess utility for all Chief Counsel attorneys.

DISCUSSION

I. Ownership Disclosure Statements

New paragraph (c) was added to Rule 20 and old paragraph (c) was redesignated as paragraph (d). New Rule 20(c) requires a nongovernmental corporation, partnership, or limited liability company to submit with its petition a separate disclosure statement. The statement for a

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nongovernmental corporation needs to identify any parent corporation and any publicly held entity owning 10% or more of petitioner's stock, or state that there is no such entity. The statement for a partnership or limited liability company needs to identify any publicly held entity owning an interest in such partnership or limited liability company or state that there is no such entity. If there is any change in the information required under this new paragraph (c), the petitioner needs to promptly submit a supplemental statement advising of the change.

New Rule 20(c) draws upon Federal Rule of Civil Procedure 7.1, local federal district court rules, Federal Rule of Appellate Procedure 26.1, and Canon 3C(1)(c) of the Code of Conduct for United States Judges to develop an appropriate financial interest standard in these circumstances. The amendment is intended to enhance the ability of Tax Court Judges and Special Trial Judges to timely identify matters in which automatic disqualification would be appropriate under the financial interest standard.

New Form 6, Ownership Disclosure Statement, in Appendix I to the rules, sets out the form of this new disclosure statement. A conforming amendment to Rule 11 was also adopted. Both new Rule 20(c) and Form 6 are effective January 1, 2010.

II. Service of Papers

Rule 21(b) was amended to change the default rule for service of papers from the court to the parties. Except when otherwise provided by the court's rules, directed by the court, or when filing simultaneous briefs, a party filing a paper other than a petition must now make service of the paper on the opposing party and attach to the paper a certificate showing that service was made. In addition, new Rule 21(b)(1)(C) now provides that, as an alternative to serving the Commissioner's counsel at the office address shown in the Commissioner's answer, service may be made at the address shown in a motion filed in lieu of an answer. These changes were made to conform the Tax Court's rules to Fed. R. Civ. P. 5(d), the court's Standing Pretrial Order requiring the parties to serve all papers after a case is calendared for trial, and to reflect common practice. The rule also facilitates electronic service by placing the burden of completing service on the party filing the paper in the event of a technical or other failure of the original service. Conforming changes implementing new Rule 21(b) were made to Rules 37, 50, 81, 91, 151, 155, and 215.

III. Limitation on the Number of Interrogatories

Rule 71(a) was amended to limit the number of written interrogatories that a party may serve on any other party to 25 unless otherwise stipulated by the parties or a greater number is allowed by order of the court. The limitation includes all discrete subparts, but excludes interrogatories described in Rule 71(d) regarding an opposing party's expert.

The amendment to Rule 71(a) conforms the Tax Court's interrogatory rule to Fed. R. Civ. P. 33(a), which also provides that unless otherwise stipulated by the parties or ordered by the court, a party may serve no more than 25 written interrogatories, including all discrete subparts. The Advisory Committee Notes to Fed. R. Civ. P. 33(a) state that experience in federal district courts confirmed that interrogatory limits were useful and manageable, and that the 25 interrogatory limitation was imposed to reduce the frequency and increase the efficiency of interrogatory practice. Essentially, it requires parties seeking interrogatories to be more focused in the formulation of their questions.

Fed. R. Civ. P. 33(a) was implemented in conjunction with broader changes to discovery

procedures in federal district courts, including amendments to Fed. R. Civ. P. 26(a). Rule 26(a) imposes an affirmative duty on the parties to disclose without awaiting formal discovery certain basic information that the parties need in most cases to prepare for trial or make an informed decision about settlement. This initial information consists of the name, address, and telephone number of each individual likely to have discoverable information and the subject of that information that the disclosing party may use to support claims or defenses; and a copy, or a description by category and location, of all documents and tangible things that the disclosing party has in its possession, custody, or control and may use to support claims or defenses. As evidenced by Rule 70(a)(1) and the holding in Branerton Corporation v. Commissioner, 61 T.C. 691 (1974), the Tax Court expects the parties to attempt to attain the objectives of discovery through informal consultation or communication before utilizing formal discovery procedures. In this regard, Rule 70(a)(1) is similar to Fed. R. Civ. P. 26(a) as it imposes on the parties an affirmative duty to disclose basic information without awaiting formal discovery.

Amended Rule 71(a) is intended to encourage the parties to voluntarily exchange information, enhance the efficiency of interrogatory practice, and allow the court to exercise greater discretion over the use of interrogatories. The agreement of the parties or judicial scrutiny is required before the 25-interrogatory limit may be exceeded. Consistent with Rule 70(b)(2), a motion by a party for leave to serve more than 25 interrogatories on an opposing party may be denied if the interrogatories are unreasonably cumulative or duplicative, or the information sought is obtainable from some other source that is more convenient, less burdensome, or less expensive; the party seeking additional interrogatories has had ample opportunity by discovery in the action to obtain the information sought; or the interrogatories are unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. Accordingly, good practice mandates that interrogatories be simple, concise, concern only matters relevant to the action, and framed as a single, definite question.

The term "discrete subparts" is not defined in Fed. R. Civ. P. 33(a) nor in amended Rule 71. The Advisory Committee Notes to Fed. R. Civ. P. 33(a) discuss the meaning of discrete subparts and the manner in which separate interrogatories are to be counted. The Notes advise that parties cannot evade the interrogatory limit through the device of joining as subparts questions that seek information about discrete separate subjects. A question asking about communications of a particular type, however, should be treated as a single interrogatory even though it requests that the time, place, persons present, and contents be stated separately for each communication.

Interrogatories concerning an opposing party's expert that are authorized under Rule 71(d) are not counted against the presumptive limit of 25 interrogatories prescribed in Rule 71(a). Rule 71(d) allows the use of written interrogatories to identify each person whom the other party expects to call as an expert witness at the trial of the case, giving the witness's name, address, vocation or occupation, and a statement of the witness's qualifications; and to state the subject matter and the substance of the facts and opinions to which the expert is expected to testify, and give a summary of the grounds for each such opinion, or, in lieu of such statement, to furnish a copy of a report of such expert presenting the foregoing information.

Amended Rule 71(a) is effective as of January 1, 2010. Formal interrogatories that exceed the 25 question limit should not served on or after January 1, 2010.

IV. Depositions for Discovery Purposes

In a significant restructuring of the court's discovery deposition rules, the Tax Court replaced Rule

74 (consensual depositions), Rule 75 (nonconsensual depositions), and Rule 76 (depositions of experts) with a single Rule 74 concerning all depositions for discovery purposes. New Rule 74 provides for the first time that a party (including the petitioner) may be deposed without consent. The amendment was made to align the Tax Court's Rules more closely to Rule 30 of the Federal Rules of Civil Procedure, which liberally permits depositions of parties, and to reflect the court's growing acceptance of depositions as a trial preparation tool and activity that may enhance settlements in cases involving expert testimony. Conforming changes have been made to Rules 70, 80, 100, 102, 104, 143, and 147.

New Rule 74(b), concerning depositions upon consent of the parties, is essentially the same as prior Rule 74, and allows depositions for discovery purposes upon the consent of the parties set forth in a stipulation filed with the court. New Rule 74(c)(2) governs depositions of nonparty witnesses without the consent of the parties to the case, and contains essentially the same provisions for nonconsensual depositions as existed in prior Rule 75. New Rule 74(c)(3) for the first time permits the nonconsensual deposition of party witnesses. New Rule 74(c)(4) prescribes rules for the deposition of expert witnesses, and replaces prior Rule 76 that governed that procedure.

Nonconsensual depositions of nonparty witnesses, party witnesses, and expert witnesses continue to be "extraordinary methods" of discovery in the Tax Court. The procedure may only be used when such a witness can give testimony or possesses documents, including electronically stored information (ESI), or things that are discoverable, and that cannot practicably be obtained through informal consultation or communication, other discovery methods, or consensual depositions. In the case of a party or expert witnesses, nonconsensual depositions may be taken only upon the granting of a written motion or other order of the court. In the case of a nonparty witness, a nonconsensual deposition may be taken upon notice to the witness and opposing party, followed by a written motion to compel in the event of an objection filed by the witness or other party.

V. Electronically Stored Information

Rule 70, containing general provisions regarding discovery, expressly references electronically stored information and makes explicit that the court's rules applicable to discovery are also applicable to ESI. ESI has always been generally subject to discovery in Tax Court proceedings. The term ESI is meant to be broad enough to cover all current types of computer-based information while maintaining flexibility for future technological changes or developments. Conforming changes to implement new Rule 70 were made to Rules 71, 72, 73, 80, 81, 82, 100, 103, 104, 147, and 181.

The court did not adopt a mandatory discovery conference as provided in the Federal Rules of Civil Procedure but rather continues to rely on the informal discovery process, during which it expects the parties to discuss and exchange information relevant to the discovery of ESI. These discussions should address what information is reasonably available and the form or format in which it should be produced.

VI. Contemporaneous Transmission of Testimony from Different Location

New paragraph (b) was added to Rule 143 to allow testimony in open court by contemporaneous transmission from a different location for good cause in compelling circumstances and with appropriate safeguards. Current paragraphs (b), (c), (d), (e), and (f) of Rule 143 were redesignated as paragraphs (c), (d), (e), (f), and (g), respectively. Conforming changes were

made to implement amended Rule 143 in Rules 12, 71, 81, 85 and 102.

In the explanation of new Rule 143(b), the court notes that situations sometimes arise in which a witness is unable to attend a trial or hearing for unexpected reasons, such as an accident or illness, and the parties may suffer substantial delays and incur significant additional costs if it is necessary to reschedule the trial or hearing to accommodate the witness. If the witness is able to testify from a different location, however, the interests of justice may be better served by accepting the witness's testimony by contemporaneous transmission, particularly if there is a risk that other, and perhaps more important, witnesses might not be available at a later time. The explanation notes that the Tax Court has a "high-tech" electronic courtroom enabling the court to receive testimony from a witness who is in a different location. Although new Rule 143(b) is not effective until January 1, 2010, the court has already conducted hearings in the electronic courtroom using remote contemporaneous transmission.

New Rule 143(b) was derived from Fed. R. Civ. P. 43(a), and the explanation of new Rule 143(b) essentially reprints most of the Advisory Committee Notes to the 1996 amendment to Fed. R. Civ. P. 43(a). The Advisory Committee Notes caution that contemporaneous transmission of testimony from a different location is permitted only upon a showing of good cause in compelling circumstances and emphasizes that the importance of presenting live testimony in court cannot be forgotten. These Advisory Committee notes point out that the presence of the finder of fact may exert a powerful force for veracity and the opportunity to judge the demeanor of a witness face to face is accorded great value. The Advisory Committee Notes advise that remote transmissions cannot be justified merely by showing that it is inconvenient for the witness to attend the trial. The Advisory Committee Notes state that good cause and compelling circumstances are likely to arise when a witness is unable to attend a trial for unexpected reasons, such as an accident or illness, but remains able to testify from a different place.

Attorneys should look to the general principles expressed in the Advisory Committee Notes to Fed. R. Civ. P. 43(a), along with cases decided under that rule, for guidance with respect to new Rule 143(b). See, e.g., Sallenger v. City of Springfield, No. 03-3093, 2008 WL 2705442 (C.D. Ill. Sept. 23, 2008) (doctor who was needed at work permitted to testify by remote transmission); In re Vioxx Products Liability Litigation, 439 F. Supp. 2d 640 (E.D. La. 2006) (remote testimony of pharmaceutical manufacturer's high-level officer permitted in bellwether multidistrict litigation where manufacturer's refusal to voluntarily produce witness at trial was for purely tactical advantage and manufacturer would not suffer any true prejudice in having witness testify by contemporaneous videoconferencing); Dagen v. CFC Group Holdings Ltd., No. 00 Civ. 5682, 2003 WL 22533425 (S.D.N.Y. Nov. 7, 2003) (good cause shown permitting Hong Kong employees to testify via telephone); but see In re Emanuel, 406 B.R. 634 (Bankr. S.D.N.Y. 2009) (fear of arrest is neither a good nor compelling reason to allow testimony video teleconference pursuant to Fed. R. Civ. P. 43(a) from an out-of-state location).

VII. Disciplinary Matters

New paragraph (b) was added to Rule 202 to require a member of the Tax Court Bar to notify the court within 30 days after: (1) conviction of any felony, or conviction of any lesser crime described in paragraph (a)(1) of Rule 202; (2) imposition of discipline by any other court; or (3) disbarment or suspension from practice before an agency of the United States Government exercising professional disciplinary jurisdiction.

New paragraph (d) was added to Rule 202 to confer discretionary authority on the court to immediately suspend a member of the Bar who is convicted of any felony or certain lesser crimes

pending final disposition of disciplinary proceedings pursuant to the court's rules. Current paragraphs (b), (c), (d), (e), (f), and (g) of Rule 202 are redesignated as paragraphs (c), (e), (f), (g), (h), and (i), respectively. The court adopted the amendments to Rule 202 to conform the Tax Court Rules to the Model Rules for Lawyer Disciplinary Enforcement.

If a Chief Counsel attorney acquires information that a Tax Court Bar member has been convicted or disciplined as described in T.C. Rule 202(b) and that member has failed to report such action to the Chair of the Tax Court's Committee on Admissions, Ethics, and Discipline, then that attorney should contact Branch 1 or 2 of the Office of Associate Chief Counsel (Procedure & Administration) at (202) 622-4910 or (202) 622-4940, respectively, to seek advice on how to proceed. These matters are required to be brought to the attention of the Associate Chief Counsel (Procedure & Administration) as the Sanctions Officer, who will determine the appropriate response with respect to any required notice to the Tax Court's Committee on Admissions, Ethics, and Discipline. See CCDM 35.10.2.2.3(3).

VIII. Payment of Tax Court Fees and Charges by Credit Card.

Rule 11, Payments to the Court, was amended to provide that in addition to making payments to the court for specified fees and charges in cash or by check, money order, or other draft, such payments may be now made by credit card. The amendment to this rule became effective September 18, 2009.

IX. Forms

Form 5, Request for Place of Trial, was amended to correct a typographical error.

Form 6, Ownership Disclosure Statement, was prescribed to facilitate compliance with new Rule 20(c).

Form 10, Notice of Change of Address, was revised to add a line for the practitioner's Tax Court Bar number. In addition, Form 10 now notes that a practitioner can satisfy the address notification requirements of Rule 200(e) by filing Form 10 in a pending case, notifying the Admissions Clerk by mail, or updating his or her registration information through the Practitioner Access link on the court's Internet "eAccess" web site.

Form 13, Notice of Intervention, is revised to require the intervenor to state the grounds for the intervention and supporting reasons.

Questions regarding the amendments to the Tax Court's Rules may be directed to Procedure & Administration Branch 6 or Branch 7 at 202-622-7950 and 202-622-4570, respectively.

/s/
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