UNITED STATES TAX COURT
WASHINGTON, D.C. 20217

March 6, 2012

PRESS RELEASE

On December 28, 2011, Chief Judge John O. Colvin announced proposed amendments to the Tax Court Rules of Practice and Procedure affecting electronic filing, discovery of work product and draft expert witness reports, and privacy protections in whistleblower cases, as well as other proposed amendments to Rules and forms. Comments were invited and were due by February 27, 2012.

Chief Judge Colvin announced today that written comments on the proposed amendments have been received. 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

FEB 27 2012

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. Number of Copies Filed, Font Requirements, and Return of Papers

In light of the successful transition to eFiling, we agree with the revision of Rule 23(b) to reduce the number of required copies of documents filed in paper form and the conforming deletion of Rule 175 with respect to small cases. To clarify that the amended rule applies only to documents filed in paper form and not all documents, such as those eFiled, we recommend that the phrase "documents filed in paper form" be substituted for the word "paper" in the proposed amended rule.

We agree with the court's proposed revision of Rule 23(d). Further, we commend the court on the proposed clarification to Rule 23(g) that the Clerk may not refuse to file a paper solely because it is not in the form prescribed by the Rules, unless directed by the court.

2. Number of Copies Filed in Small Tax Cases

We agree with the proposal to delete Rule 175.

3. Mandatory eFiling for Most Represented Parties

We agree with the revisions to Rule 26 to formalize the eFiling requirements, including extending the eFiling requirement to all parties represented by counsel. The Office of Chief Counsel's experience with eFiling has been universally positive.

In the explanation to proposed Rule 26, the court contemplates making the eFiling requirement retroactively effective for all cases filed after July 1, 2010. We recommend the court clarify whether a previously filed Notice To Be Exempt from eFiling will continue to be honored if proposed Rule 26 is adopted. Some motions are time sensitive and petitioners may be prejudiced if their attorneys are unaware of the court's revision to Rule 26.

To conform to Rule 23's proposed amendment concerning number of copies filed, we recommend that Rule 26 include a statement that a document accepted for eFiling will be deemed to have complied with the form and style of papers requirements in Rule 23.

4. Protection for Trial Preparation Materials and Draft Expert Witness Reports

We agree with proposed Rule 70(c)(3) to formalize the court's application of the work product doctrine set forth in Fed. R. Civ. P. 26(b)(3).

The court also proposes to amend Rule 70(c)(4) to include the same work product protections of revised Fed. R. Civ. P. 26(b)(4) limiting the discovery of draft expert witness reports and certain attorney-expert communications. Given the unique use of expert reports in Tax Court proceedings as direct trial testimony, proposed Rule 70(c)(4) – particularly with respect to draft expert reports – risks the admission of less reliable expert testimony.

Expert testimony is useful to the presentation of evidence and assists the court's understanding of that evidence, but it is undoubtedly a partisan process – the parties hire competing experts and the court must determine whether those experts' opinions are reliable and relevant. The court recognizes the dangers inherent in the presentation of evidence in this manner. See, e.g., Neonatology Associates v. Commissioner, 115 T.C. 43, 86 (2000) (noting that an expert who advocates the litigation position of one side does not help the trier of fact). The need for reliable expert witness reports is heightened in Tax Court proceedings.

The report required under Fed. R. Civ. P. 26(a)(2)(B) merely discloses to the opposing party the opinions to which the expert will later testify at trial and serves primarily as a useful tool in focusing expert discovery. In contrast, under Tax Court Rule 143(g), the expert report becomes the direct trial testimony of the expert. In exercising its gatekeeper function under Daubert v. Merrell Dow Pharm. Inc., 509 U.S. 579 (1993), the court has excluded expert reports when the report was not established to be the words, analysis, and opinions of the expert. See Bank One Corp. v. Commissioner, 120 T.C. 174 (2003); Estate of Noble v. Commissioner, T.C. Memo. 2005-2. It is thus imperative that the parties be able to explore through discovery whether the opinions expressed are in fact those of the expert and not counsel.

In proposing the revised Fed. R. Civ. P. 26(b)(4), the Civil Rules Advisory Committee stated that the reasons for protecting draft expert reports and attorney communications were "profoundly practical" – that discovery of these "almost never reveals useful information about the development of the expert's opinions," that "draft reports somehow do not exist," and that the maneuvering of litigants to avoid such discovery was increasing the costs of litigation. See Report of Civil Rules Advisory Committee, at 3 (May 8, 2009). Based on anecdotal evidence, the Advisory Committee noted that practitioners had developed coping mechanisms to avoid discoverable events, including hiring non-testifying experts as consultants and, in some cases, were stipulating around the open discovery of attorney-expert communications. Id. This lack of discoverable information is perhaps understandable considering the district court practice in which the expert witness must take the stand and convincingly express the opinion testimony as his or her own.

The practical concerns raised by the Advisory Committee do not translate neatly to Tax Court proceedings. First, in our experience, Tax Court litigants do not engage in costly maneuvering to avoid expert discovery as was perceived by the Advisory Committee. Further, because expert reports in Tax Court proceedings are ultimately adopted as the expert's direct trial testimony, it is impractical for attorneys to discourage experts from creating draft reports. It is our experience that expert discovery produces useful information when it discloses attempts by attorneys to exert undue influence in the drafting of expert reports. Indeed, the court is no stranger to discovery revealing an attorney's influence on expert reports. See Bank One Corp. v. Commissioner, 120 T.C. at 274 (excluding expert report tainted in its preparation by the significant participation of the taxpayer's counsel). Even when discovery does not produce useful information, it serves as a deterrent to overreaching attorneys. Thus, we are concerned that adoption of proposed Rule 70(c)(4) will limit the parties' and the court's ability to detect improper influence in expert witness reports.

It is possible that some of these concerns can be ameliorated through the exceptions of proposed Rule 70(c)(4)(B)(ii) and (iii) that allow discovery of the facts and data and the assumptions that an attorney provided to the expert and that the expert considered. For example, attorneys may be able to uncover undue influence through the attorney providing incomplete data or biased assumptions to the expert. This limited discovery will not shed any light on potential attorney involvement in the drafting of the expert report. Without access to draft reports and attorney-expert communications, it will be more difficult to uncover improper attorney involvement prior to trial.

Proposed Rule 70(c)(4) will also likely disrupt the efficient presentation of evidence and may lead to confusion on the admissibility of reports. Nothing in proposed Rule 70(c)(4) will prevent counsel from cross examining experts on the same information and communications that would be protected in discovery. For instance, if adopted, counsel would be expected to cross examine or voir dire an expert in depth on any revisions the opposing parties' counsel suggested to the offered report. It is conceivable that experts will not be able to identify with specificity where changes have

been made by counsel, leaving the impression, whether accurate or not, that the witness did not draft the report. These matters are best explored prior to trial with the continued availability of draft reports and attorney-expert communications as part of discovery.

Finally, based on the court's explanation, it appears proposed Rule 70(c)(4) intends to follow Fed. R. Civ. P. 26(b)(4) in allowing discovery of protected expert work product when there is a substantial need for the materials sought to be discovered. As drafted, it is not clear that proposed Rule 70(c)(3) and Rule 70(c)(4) would, in fact, allow discovery of expert work product when there is a substantial need. Rule 70(c)(3) suggests that the substantial need exception to work product protections in discovery are "subject to Rule 70(c)(4)." Rule 70(c)(4) is stated in absolute terms with no stated exception for discovery in the case of substantial need or cross reference back to Rule 70(c)(3). That the exception to Rule 70(c)(3) is "subject to Rule 70(c)(4)" could thus be read to suggest that Rule 70(c)(4) trumps Rule 70(c)(3) when expert discovery is sought. In contrast, Fed. R. Civ. P. 26(b)(4) is specific in providing that the work product protections of Fed. R. Civ. P. 26(b)(3), including the exception for substantial need, govern discovery with respect to experts. Accordingly, we recommend that the court clarify the circumstances, if any, when protected draft expert reports and attorney-expert communications may be discovered under the substantial need exception of proposed Rule 70(c)(3).

Notwithstanding our concerns with respect to proposed Rule 70(c)(4), we agree with proposed Rule 143(g). The additional information to be included in expert reports will assist the parties in conducting more informed and efficient examinations of expert witnesses during trial.

5. Conforming Changes to Rule 121, Summary Judgment

We agree with the proposed amendment to Rule 121(b) to conform to the revised terminology of Federal Rule 56(a) that summary judgment may be granted when there is no "genuine dispute" as to a material fact.

We also agree with the amendments to Rule 121, as well as the conforming amendments to Rules 20, 33, 57, 143, 173, 231, 232, 271, and 281 to recognize the use of unsworn declarations subscribed under the penalty of perjury consistent with 28 U.S.C. § 1746. It is our experience that the court has been accepting unsworn declarations in the same manner as affidavits. Accordingly, we agree with the formal recognition of this practice in the Rules.

6. Use of Rule 155 Computations With Dispositive Orders

We agree with the proposed revision to Rule 155(a) to clarify that Rule 155 computations may be filed also following the issuance of dispositive orders.

Previously, Rule 155(b) required a party to file alternate computations prior to or with a notice of objection. Revised Rule 155(b), which became effective on May 5, 2011, now apparently allows a party to file an objection to a computation filed by one party without filing alternative computations. We recommend that the court reinstate the previous requirement in Rule 155(b) for an alternative computation to accompany any objection to a computation filed unagreed by one party in order to expedite the resolution of Rule 155 disputes.

We also recommend that the court clarify that when the Clerk serves a notice of filing of a Rule 155 computation, the computation to which the notice of filing pertains will not accompany the notice of filing being served. The computation previously filed unagreed by one party will have already been served on the opposing party electronically or on paper when it was filed and will not be served again by the Clerk with the notice of filing.

7. Notice by the Tax Matters Partner of the Filing of a Petition

Proposed Rule 241(f) extends the time period within which a tax matters partner must provide notice to partners of the filing by the TMP or any other partner of a petition for judicial review under section 6226 or 6228(a). The proposed rule extends the period for providing notice from five days to 30 days after the filing or receiving notice of the filing of a petition for judicial review. If adopted, the proposed amendment would bring the court's rule into conformity with the 30-day notification time period contained in Treas. Reg. § 301.6223(g)-1(b)(3). Accordingly, we concur with the court's proposed amendment to the rule and have no further comments on the proposed rule.

8. Privacy Protections for Filings in Whistleblower Actions

Proposed Rule 345(a) provides that a petitioner in a whistleblower case may move for permission to proceed anonymously, if appropriate. A petitioner seeking to proceed anonymously under this proposed rule must file with the petition a motion, with or without supporting affidavits or declarations, setting forth a sufficient, fact-specific basis for anonymity. The court would then temporarily seal the petition and all other filings, pending a ruling on the motion to proceed anonymously.

Proposed Rule 345(b) provides that certain identifying information of the taxpayer to whom a whistleblower claim relates must be redacted from, or not included in, electronic or paper filings. Under the proposed rule, a party or non-party filing a redacted document in a whistleblower action must also file under seal a reference list that identifies the redacted information. The proposed rule provides that the reference list may be amended as a matter of right, and may be unsealed, in whole or in part, at the court's discretion. We agree with the proposal, but note that the requirement to supply a reference list for each redacted document may be burdensome in some cases. In addition, creating a usable reference list identifier for some unusual or unique identifying information may be challenging.

As noted in the Explanation to Proposed Rule 345, we formally brought our concerns with the public disclosure of nonparty taxpayer information in whistleblower actions to the court's attention. We recommended that the court consider developing rules applicable to whistleblower actions that require the redaction of nonparty taxpayer information. Previously, in our July 31, 2008 comments to the court, we noted that, while we presume that the provisions of Rules 27 and 103 are applicable to whistleblower actions, specific confidentiality rules in Title XXXIII may be warranted.

Proposed Rule 345 is in many respects consistent with our recommendation and comments. We appreciate the court's recognition of, and responsiveness to, the privacy issues arising in whistleblower actions.

The court, in discussing policy considerations in the Explanation to the Proposed Rule, cites Whistleblower 14106-10W v. Commissioner, 137 T.C. No. 15 (Dec. 8, 2011), and mentions the balancing test the court used in that case to resolve the petitioning whistleblower's motion to proceed anonymously. The proposed rule, however, focuses on the procedure for seeking anonymity and does not set out the standards for allowing anonymity. Indeed, the court's explanation states that the proposed rule would formalize the existing procedure for seeking anonymity in whistleblower actions, again citing Whistleblower 14106-10W. We agree that the rule should focus on procedure rather than substance. We recommend that the court continue to refrain from incorporating into the court's rules the standards for proceeding anonymously, and allow the issue to be developed in the context of actual cases. In this regard, other federal courts have developed useful standards for proceeding anonymously in the context of actual cases. See, e.g., Lozano v. City of Hazleton, 620 F.3d 170 (3d Cir. 2010); Sealed Plaintiff v. Sealed Defendant, 537 F.3d 185 (2d Cir. 2008).

As noted in our March 1, 2011 letter to the court, the Internal Revenue Service does not include nonparty taxpayer information in determination notices issued pursuant to section 7623. We stand ready to further safeguard nonparty taxpayer information by adhering to Proposed Rule 345(b). Finally, we recommend that the court allow the standards for unsealing a redaction reference list, like the standards for proceeding anonymously, to be developed in the context of actual cases.

Once the court finalizes the proposed amendments, we recommend that a complete set of the court's rules be available in a single location on the court's website. As currently configured, the court's website requires the opening of various press releases to find the latest amendments to particular rules. In our experience, this has led to mistaken reliance on outdated versions of certain rules.

We appreciate this opportunity to comment on the proposed amendments to the court's rules. My staff and I are available to discuss these comments in more detail at the court's request.

Sincerely,

Deborah A. Butler
Associate Chief Counsel
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cc: Peter A. Lowry
Chair, Court Procedure & Practice Committee
ABA Section of Taxation