



Section of Taxation

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February 10, 2016

The Honorable Michael B. Thornton
Chief Judge
United States Tax Court
400 Second Street, NW
Washington, DC 20217

Re: Comments on Proposed Amendments to the Tax Court Rules of Practice and Procedure to Modify the Signature and Filing Requirements

Dear Chief Judge Thornton:

Enclosed please find comments on changes to the Tax Court's Rules of Practice and Procedure ("Comments"). These Comments are submitted on behalf of the American Bar Association Section of Taxation and have not been approved by the House of Delegates or the Board of Governors of the American Bar Association. Accordingly, they should not be construed as representing the position of the American Bar Association.

The Section of Taxation would be pleased to discuss the Comments with you or your staff if that would be helpful.

Sincerely,

George C. Howell, III
Chair, Section of Taxation

Enclosure

cc: William J. Wilkins, Chief Counsel, Internal Revenue Service

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**AMERICAN BAR ASSOCIATION
SECTION OF TAXATION**

**COMMENTS ON PROPOSED AMENDMENTS TO THE TAX COURT
RULES OF PRACTICE AND PROCEDURE TO MODIFY THE
SIGNATURE AND FILING REQUIREMENTS FOR PLEADINGS AND
OTHER DOCUMENTS FILED ELECTRONICALLY**

These comments (the “Comments”) are submitted on behalf of the American Bar Association Section of Taxation (the “Section”) and have not been approved by the House of Delegates or Board of Governors of the American Bar Association. Accordingly, they should not be construed as representing the position of the American Bar Association.

Principal responsibility for preparing these Comments was exercised by the Section’s Committee on Court Procedure and Practice (“CPP”) Chair, Juan F. Vasquez, Jr., and Vice Chairs, Joshua D. Odintz and Alexandra Minkovich. Substantive contributions were made by Erica Brady and Elizabeth K. Blickley. The Comments were reviewed by Mary A. McNulty, the Section’s Council Director for CPP and a member of the Section’s Committee on Government Submissions; and Peter Blessing, the Section’s Vice Chair (Government Relations).

Although the members of the Section who participated in preparing these Comments have clients who might be affected by the federal tax principles addressed by these Comments, no such member or the firm or organization to which such member belongs has been engaged by a client to make a government submission with respect to, or otherwise to influence the development or outcome of, the specific subject matter of these Comments.

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Date: February 10, 2016

Executive Summary

On January 11, 2016, Chief Judge Michael B. Thornton announced by press release that United States Tax Court proposed changes to the Court's rules to permit electronic filing of petitions and other documents not currently permitted to be electronically filed. As part of the Court's ongoing efforts to improve and modernize its rules and procedures, Chief Judge Thornton invited the public to submit for consideration any comments regarding the proposed amendments. These comments are submitted in response to that invitation. They first provide the Section's views on the proposed amendments and then make additional proposals directly related to the transition to electronic filing to improve practice before the Court. The Section appreciates the opportunity to provide comments on how to improve practice before the Court and specifically outline certain areas where additional guidance is requested.

The Section's comments can be summarized as:

- I. General support for, and agreement with, the proposed amendments: The Section commends the Court's movement towards e-filing petitions and other documents. However, as the Court has acknowledged, additional guidance is needed to provide the parameters of electronic filing.
 - a. Rule 22: Filing: The Section requests specific guidance from the Court outlining both the time and time zone in which the final day for filing will end under 26 U.S.C. 7502, once the Court permits electronic filing of petitions.
 - b. Rule 23: Form and Style of Papers: The Section supports the Court's proposed amendment to require the email address of the party or the party's counsel in the signature block. The increased use of email will facilitate communication and production of documents between the parties.
- II. Additional proposals
 - a. Rule 20: Commencement of Case: The Section requests guidance on the electronic filing of the other required documents in Rule 20, which may contain sensitive taxpayer information.
 - b. Rule 11: Payments to the Court: The Section requests guidance on how the filing fee will be paid if the petition is filed electronically and whether Rule 11 should be amended to specifically provide for electronic payment of the filing fee.
 - c. Other documents that need to be filed under seal: The Section requests guidance on documents to be filed under seal, such as petitions where the individual requests to proceed anonymously, petitions in disclosure actions, or documents the Court orders to be filed under seal.

COMMENTS ON PROPOSED AMENDMENTS TO THE TAX COURT RULES OF PRACTICE AND PROCEDURE

I. Response to the Court's Proposals.

a. General support.

The Section generally supports the proposed amendments to Rules 3, 22, 23, 25, and 34, and agrees that it is appropriate for the Court to permit electronic filing of petitions and other documents. However, the Section suggests including a cross-reference in the Rules to where on the Court's website the electronic filing guidelines can be found. This will permit flexibility when and if the electronic filing procedures are updated without the need to update the Court's Rules. Further, it may be appropriate to provide additional guidance with respect to the remaining requirements of Rule 20: Commencement of Case. The Section's suggestions are outlined in section II below.

b. Rule 22: Filing

Rule 22 continues to make reference to the timely filing rule of 26 U.S.C. 7502, and the explanation provides that documents may be filed electronically either during or outside of business hours. With respect to Rule 22(c), the Section requests specific guidance from the Court outlining both the time and time zone in which the final day for filing will end.

Section 7502(c) provides:

(c) **Registered and certified mailing; electronic filing**

(1) **Registered mail**

For purposes of this section, if any return, claim, statement, or other document, or payment, is sent by United States registered mail—

(A) such registration shall be prima facie evidence that the return, claim, statement, or other document was delivered to the agency, officer, or office to which addressed; and

(B) the date of registration shall be deemed the postmark date.

(2) **Certified mail; electronic filing**

The Secretary is authorized to provide by regulations the extent to which the provisions of paragraph (1) with respect to prima facie evidence of delivery and the postmark date shall apply to certified mail and electronic filing.

However, where the Court controls the method of filing, namely electronic filing, and it provides the postmark equivalent, we believe it would be appropriate to provide for the time and the time zone that will control. The Section recommends that the Court state that a document shall be considered timely filed when it is electronically filed on or before the last day of the applicable period at 11:59 p.m. in the local time zone of the taxpayer. Further, the Court could implement a toggle switch for the taxpayer to use to indicate the time zone in which he or she is located.

c. Rule 23: Form and Style of Papers

With respect to Rule 23(a)(3), the Section supports the Court's proposed amendment to require the email address of the party or the party's counsel in the signature block. The increased use of email will facilitate communication and production of documents between the parties.

At this time, some attorneys will only agree to use traditional mailing or facsimile for communicating or sharing documents. This change will benefit the parties and the Court because cases could move along more quickly and the risk of lost documents and identity theft will decrease. Currently, many mailings to IRS counsel are delayed several days due to internal mail routing and some mailings to the taxpayer are not ensured delivery because the taxpayer is not present to sign for the delivery. The IRS also permits some of its attorneys to work remotely, and requiring the attorney to provide an email address will ensure attorneys working remotely can obtain documents more quickly, regardless of when that attorney returns to the office.

Further, the use of email addresses will facilitate continued contact with taxpayers who move addresses during the pendency of their case. While many people move, taxpayers often retain their personal email addresses regardless of their physical address. This method of contact does not cause the taxpayer to incur any additional costs to communicate with the IRS and will reduce the cost of providing documents.¹

II. Additional Proposals.

d. Rule 20: Commencement of Case

Rule 20 provides that along with the petition, the taxpayer must also file a Statement of Taxpayer Identification Number, Disclosure Statement if applicable, and the \$60 filing fee or an Application for Waiver of Filing Fee. Currently, the Statement of Taxpayer Identification Number is kept confidential and not a part of the file available to the public. The Section requests guidance on how that document may be filed under seal or some other method to keep the sensitive taxpayer information confidential.

Consistent with the Section's comments dated November 10, 2015, the Section continues to support the redaction or sealing of documents that include sensitive personal and financial information, such as would be included in the Application for Waiver of Filing Fee. Similar to the Statement of Taxpayer Identification, we believe that means exist to permit an Application for Waiver of Filing Fee to be electronically filed under seal.

e. Rule 11: Payments to the Court

Consistent with Rule 20, in order to commence a case in the Court, the taxpayer must pay the \$60 filing fee. The Section suggests amending Rule 11, Payments to the Court, to provide direction in how the Court will accept the filing fee electronically. For example, Rule 11 currently states that "[t]he Court may also permit specified fees or charges to be paid by credit card." It may be expeditious to make reference in Rule 11 to the Court's website for payments

¹ The Section is aware that the IRS is still bound by disclosure rules provided in the Internal Revenue Code and their emails to taxpayers will be encrypted.

by credit card and/or to make reference in the Rule that the filing fee is one such “specified fee”. The Court’s website currently refers to the Court’s utilization of Pay.gov for other fees and could easily be updated to include reference to the filing fee. The Court may also directly include reference to Pay.gov for the payment of the filing fee.

f. Other documents that need to be filed under seal

The Court will often temporarily seal a petition or document that is filed and contains sensitive taxpayer information. Sometimes those documents are attached to the petition and are ultimately returned to the taxpayer as documents in the nature of evidence and may not ultimately become part of the record. In other instances, the taxpayer requests that certain documents or the entire case be under seal. However, until the Court determines whether a request to proceed anonymously or a motion to seal the record or a document, we recommend that a mechanism be established to at least provisionally permit electronic filing of a document under seal.

In addition, for matters that are entirely under seal, for example in some whistleblower and disclosure cases, we recommend that there be a mechanism to permit filings under seal. Additionally, in those matters, there may be both a redacted and an unredacted version of documents to be filed. For such cases, if documents are to become part of the record, we recommend creation of a mechanism to file both redacted and unredacted versions of documents. The Section believes that a short delay in the posting of the documents may permit the Court to verify the redactions, if desired.

With respect to documents that are not, and may never be, a part of the record, such as documents provided for in camera review, the Section believes the current paper process should continue to be utilized.

We would be happy to answer any questions you might have or discuss this matter further. Thank you for the opportunity to provide comments on the proposed rule changes.