UNITED STATES TAX COURT
WASHINGTON, D.C. 20217

November 28, 2006

PRESS RELEASE

On September 12, 2006, Chief Judge John O. Colvin announced a proposed amendment to Rule 173(b), Tax Court Rules of Practice and Procedure, requiring the filing of answers by the Commissioner of Internal Revenue in all small tax cases. Chief Judge Colvin invited comments relating to that proposal and announced that, absent further notice, the proposed amendment would be effective as to small tax cases in which the petition was filed after November 27, 2006.

Chief Judge Colvin announced today that written comments to the proposed amendment have been received. The comments are attached to this press release and are available at the Tax Court's Web site, www.ustaxcourt.gov. Chief Judge Colvin also announced that, in order to permit the Court to evaluate the comments and to provide the Commissioner of Internal Revenue additional time in which to prepare for the possible implementation of the proposed amendment, the effective date of the proposed amendment will be extended until further notice by the Court.

CARDOZO

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October 30, 2006

Mr. Robert R. Di Trolio
Clerk of the Court
U.S. Tax Court
400 Second St., N.W., Room 111
Washington, D.C. 20217

Re: Proposed Amendment to Rule 173(b)

Dear Mr. Di Trolio:

I am the Director of the Cardozo School of Law Tax Clinic, which represents low-income taxpayers before the Tax Court. Several times a year, I participate in meetings with staff of Low Income Taxpayer Clinics in the New York City area to discuss issues common to our practice. In a meeting held on September 29, 2006, we considered the proposed changes to Tax Court Rule 173(b) requiring answers to be filed in all small tax cases. I wish to report to you the consensus of the discussion among the individuals at that meeting.

While we agree that it would be beneficial to all parties – petitioners, IRS, and the Court -- to require early communication between the parties in S cases, in order to encourage settlement discussions, we do not believe it is necessary or beneficial to low income taxpayers in S cases to require answers to their petitions, for the following reasons:

First, it was noted that the clinics in New York City do not handle the majority of cases on New York City S case trial calendars. The majority of petitioners have been, and continue to be, unrepresented. In those cases where individual pro se petitioners have come to us (usually after being alerted to our existence by a trial notice stuffer), many of their petitions lack the specificity and clarity of formal pleadings. Petitioners often write sentence fragments, long sentences with many clauses, or lengthy prose paragraphs in section 4 of the S case petition (sometimes using attachments). Requiring the filing of an answer would cause considerable time to be spent by respondent's counsel parsing which portions of sentences or sentence fragments in pro se S case petitions to admit, deny, or deny for lack of information. In addition, the difficulty of preparing an accurate answer is likely to cause respondent to resort to motions under Rule 51 for more definite statement or a Rule 52 motion to strike. This could lead to creating a more formalized

pleading requirement on pro se petitioners, with which many would have difficulty complying.

Moreover, in low income taxpayer cases, the items in dispute are usually sufficiently clear from the notice of deficiency or determination. Respondent's time spent in this endeavor would not make it substantially clearer to the Court or to the petitioner what facts or items are disputed.

Further, we do not believe most pro se petitioners would understand the distinction in respondent's answer between a denial for lack of information and a plain denial. An answer might confuse them more than help them in relatively simple cases.

The Court would know better how frequently in the calendars of pro se S cases there arise 11th-hour procedural and jurisdictional motions and motions to discontinue small tax case procedures. However, if these occur only infrequently, then the benefit of possibly causing such infrequent motions to occur earlier probably would be offset by the adverse consequences noted above of respondent's preparing answers and petitioners understanding them in all S cases.

We strongly agree that it would be beneficial to petitioners, and their counsel (if any), to receive notice of the name, address, and telephone number of the IRS attorney who has responsibility for a small tax case. We at the clinics often have telephone numbers of paralegals in local IRS counsel's office or employees of local Appeals Offices whom we contact to locate the IRS person who has jurisdiction of an S case. But pro se petitioners do not have these resources. Further, the IRS' recent program of assigning Appeals Officers in Service Centers to settle S cases has led to additional complications. We do not have phone numbers for people at all the Appeals Offices at all of the Service Centers. Thus, our prior ways of identifying who has settlement jurisdiction of a case will no longer work.

The consensus view at the meeting seemed to be that, in lieu of requiring answers in all small tax cases, Rule 173(b) should simply be amended to add a requirement that the IRS file a notice with the Court, served on petitioner, stating the name, address, and telephone number of the IRS counsel who has responsibility for the case. The notice should be filed no later than the time the IRS would normally have to prepare an answer in a regular case – 60 days. Further, if the case is to be sent to an Appeals Office for consideration of settlement, the notice to be filed should contain the name of the Appeals Office and a telephone number of the contact person there. Such notice would take only minutes for an IRS counsel to prepare, and would facilitate pretrial communication between the parties, without unduly formalizing the pleadings process.

Sincerely,

Carlton M. Smith

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
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OFFICE OF
CHIEF COUNSEL

NOV 9 2006

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

Reference: Proposed Amendment to Tax Court Rule 173(b) to Require the Commissioner to File Answers in All Small Tax Cases

Dear Mr. Di Trolio:

We appreciate the opportunity to comment on the Court's proposal to amend Rule 173(b) of the Tax Court's Rules of Practice and Procedure to require the Commissioner to file answers in all small tax cases heard pursuant to section 7463 of the Internal Revenue Code. We support the proposal and are taking steps to both implement the new requirement and to respond to some of the consequences we expect will result from the rule change, discussed below.

In the Notice of Proposed Amendment to Rules accompanying the Court's Press Release of September 12, 2006, the Court described several factors underlying the proposal to amend Rule 173(b). The Court noted that the jurisdictional limitation for small tax cases has increased over time from its original $1,000 amount to the current amount of $50,000, and that small tax cases now comprise approximately one-half of the Court's inventory. The Court observed that petitioners in such cases are being increasingly represented by low income taxpayer clinics, and that some individuals have experienced difficulties in identifying and communicating with the IRS attorneys responsible for their cases. The Court concluded that the requirement to file answers in all small tax cases would alleviate those problems. The Court also concluded that the answer requirement would result in the earlier consideration of small tax cases by the appropriate IRS attorney and reduce the instances of dilatory procedural and jurisdictional motions that are sometimes filed in these cases. In addition, the Court acknowledged its authority under section 7463(d) to discontinue small tax case proceedings in appropriate cases, such as cases with potential precedential value or those presenting novel issues resulting from changes in the tax law. The Court concluded that the answer requirement would promote an earlier determination of whether cases should remain in small tax case status.

We understand the proposal to amend Rule 173(b) is a component of a larger initiative to improve the processing and disposition of small tax cases within the Court. This initiative, as described by Chief Judge Colvin during the October 20, 2006 Joint Fall Meeting of the ABA Tax Section in Denver, Colorado, includes sending low income taxpayer clinic information in the Court's acknowledgement letters responding to new small tax case petitions, which may result in improved representation for small tax case petitioners. In order to provide the parties with increased advance notice of the scheduling of small tax cases for trial, the Court is now issuing trial notices in small tax cases five months in advance of calendar call instead of only 60 to 75 days in advance of trial. The Court's Standing Pre-Trial Notice for Small Tax Cases now requires pre-trial memoranda to be filed in all small tax cases proceeding to trial, which will provide the Court and the parties with timely and accurate case status information and a concise description of the issues and witnesses to be presented at trial, enhancing the efficient disposition of the cases.

We appreciate the Court's concerns that have caused it to propose the amendment to Rule 173(b). We agree with the need to promptly inform petitioners of the name and address of the IRS attorney assigned to their cases, as well as information concerning the current status of individual cases.

In order to assist us in timely answering small tax case petitions and more effectively communicating with petitioners, we request that the Court ensure that copies of all attachments to a petition are included with the copy of the petition served on the respondent. Many such attachments, in addition to the statutory notice or determination letter upon which the case is based, contain identifying information that may enable us to confirm the taxpayer's identity and taxable years involved, and more readily locate the related administrative files. Identifying the taxpayer and locating the files are important not only for preparation of the answer to the petition, but also to avoid premature assessment and collection activity in violation of statutory restrictions with respect to liabilities pending before the Court.

In light of the Service's historic difficulties in locating and retrieving administrative files, the requirement to answer all small tax case petitions may lead to a number of motions to extend time within which to answer. We hope the Court will be liberal in granting such motions. Alternatively, to the extent allegations in a petition must be denied for lack of knowledge due to the lack of an administrative file, such a denial is consistent with the reasonable inquiry standard and certification requirements of Tax Court Rule 33(b). While extending the answer due date will inevitably delay the joinder of issue in a number of small tax cases otherwise available for trial calendaring, we recommend that the Court confirm that, pursuant to Rule 173(c), no reply to an answer shall be filed and that any affirmative allegations contained therein shall be deemed denied. Thus, the case would be considered at issue upon the filing of the answer pursuant to Rule 38.

We also agree with the need to give early and continuing consideration to the question of whether any particular small tax case is appropriate for disposition under section 7463. Under current procedures, every Associate Area Counsel is required to review each new small tax case petition when first received to determine whether the small tax case election is allowable or otherwise appropriate. Individuals assigned to these cases are also under instructions to continue that consideration during the preparation of the case for trial or other disposition. We will reemphasize to our attorneys the need to carefully adhere to these procedures in order to reduce or eliminate the instances of dilatory jurisdictional or other procedural motions over which the Court has expressed concern in small tax cases.

Additional Recommendations for Changes to the Tax Court's Rules

We offer several additional suggestions for modifications of the Court's rules on pleadings in order to resolve a number of questions that have arisen over the years with respect to computation of time, signature requirements, timeliness, and amendments to pleadings. A number of these suggestions have been included in prior comments to various proposed amendments to the Tax Court's Rules.

T.C. Rule 25. Computation of Time

We recommend that Rule 25(c) be modified to clarify that a jurisdictional motion affects the computation of time for a responsive pleading only when the motion is filed before the due date of the responsive pleading. Under the current rule, the filing of a jurisdictional motion after the due date of a responsive pleading would, after its disposition, theoretically permit the filing of a delinquent responsive pleading without leave of the Court. We also recommend that a withdrawn jurisdictional or other procedural motion be considered as a disposition sufficient to restart the time for filing a responsive pleading, in the same manner as if the motion had been denied.

We further recommend that Rule 25(c) provide that the time for filing a responsive pleading shall not begin to run if the Court has issued an order requiring the filing of an amendment or a supplement to a pleading, such as an order requiring the filing of an amended petition following the original filing of an imperfect petition. We have occasionally attempted to file answers despite the pendency of such orders in order to comply with the time requirements of Rule 36(a), only to have those answers rejected by the Court and returned unfiled. A modification of the Rule as recommended may reduce or eliminate such occurrences.

Accordingly, we recommend that the third sentence of Rule 25(c) be modified as follows:

> Where a motion is made concerning jurisdiction or the sufficiency of a pleading *prior to the date by which a responsive pleading is required to be filed*, the time

> for filing a response to that pleading shall begin to run *anew* from the date of service of the order disposing of the motion by the Court, *including motions for which leave to withdraw has been granted,* unless the Court shall direct otherwise. *If the Court has issued an order directing the filing of an amendment or a supplement to a pleading, the time for filing a response to that pleading shall begin to run from the date of service of the amendment or supplement required by the order.*

T.C. Rule 33(b). Signing of Pleadings (Effect of Signature)

There are have been numerous instances where a party's representative or purported representative signs and files frivolous pleadings. In certain instances, the Court will determine that the purported representative has not established capacity and dismiss the case for lack of jurisdiction. Amending T.C. Rule 33(b) will clarify that the party's representative or purported representative will be subject to sanctions for violating T.C. Rules 33(b) or 50(a) in any event. As such, we recommend changing T.C. Rule 33(b) to read as follows:

> The signature of counsel or a party *or the party's representative* constitutes a certificate by the signer that the signer has read the pleading, that, to the best of the signer's knowledge, information, and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. .... If a pleading is signed in violation of this Rule, the Court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, including reasonable counsel's fees *regardless of whether the Court has jurisdiction over the underlying case.*

T.C. Rule 34. Petition

Pursuant to section 7491(a)(1), the burden of proof is not placed on the respondent until a taxpayer introduces credible evidence with respect to a factual issue and satisfies the limitations set forth in section 7491(a)(2). The Court may wish to discourage the parties from raising burden of proof issues prematurely in the pleadings. Accordingly, we recommend that the Court provide in T.C. Rule 34(b) that an allegation concerning the allocation of the burden of proof shall not be included in the petition. Such a provision would be analogous to the specification in T.C. Rule 34(b)(8) that a claim for reasonable litigation or administrative costs shall not be included in the petition in a deficiency or liability action.

T.C. Rule 36. Answer

We recommend that Rule 36(a) be modified to clarify the time period within which to file an "Answer to Petition, as Amended." Under the current Rule, the Commissioner has 60 days from the date of service of the petition within which to file an answer, and like periods within which to file answers to an amended petition or amendments to petition. The Rule is silent, however, on the time period within which to file an answer to a petition, as amended.

For example, if respondent is served with an "Amended Petition" prior to filing the answer to the original petition, Rule 36(a) permits the filing of an "Answer to Amended Petition" within 60 days of the service of the amended petition. Likewise, if respondent is served with an "Amendment to Petition" after the filing of the answer to the original petition, Rule 36(a) permits the filing of an "Answer to Amendment to Petition" within 60 days after service of the amendment. On the other hand, if respondent is served with an "Amendment to Petition" prior to the filing of the answer to the original petition, respondent prepares a single responsive pleading entitled "Answer to Petition, as Amended" addressing both the petition and its amendment. Rule 36(a) does not address the time within which such a pleading is required to be filed.

Our understanding of current practice is that the Commissioner is given 60 days from the date an amendment to petition is served within which to file the responsive pleading described above. The question concerning the due date for this pleading frequently arises, however, because such a time frame leaves the original petition unanswered beyond the answer date prescribed under the Rule. We, therefore, recommend that the first sentence of Rule 36(a) be modified as follows:

> The Commissioner shall have 60 days from the date of service of the petition within which to file an answer, *or 60 days from the date of service of an amendment to the petition within which to file an answer to the petition as amended,* or 45 days from that date within which to move with respect to the petition *or the petition as amended.*

We also recommend that the 45 day period within which to move with respect to the petition as set forth in Rule 36(a) be modified to except the filing of a motion to dismiss for failure to state a claim upon which relief can be granted.

T.C. Rule 41. Amended and Supplemental Pleadings

We recommend that T.C. Rule 41(a) be modified to clarify the circumstances under which leave of the Court is required before amending a pleading to which no responsive pleading has been served. Under the current Rule, a party may amend a pleading once, as a matter of course, at any time before a responsive pleading is served, without leave of the Court. On occasion, respondent has sought to amend an

answer to which a reply was required, but never filed, well after the case is at issue under Rule 38. While we believe that the Court intends that leave of Court be sought in such a situation, the plain language of the Rule does not require it, even if the case has been placed on a trial calendar. Accordingly, we recommend that the first sentence of Rule 41(a) be modified as follows:

> *If the case has not been placed on a trial calendar, a* party may amend a pleading once as a matter of course at any time before a responsive pleading is served *or, if no responsive pleading is served, the expiration of the time within which a responsive pleading is required to be filed.*

Again, we support the Court's proposed amendment to Rule 173(b) requiring the Commissioner to file answers in small tax cases, and concur that the amendment will address many of the concerns outlined in the Court's Notice accompanying the proposal. We look forward to continuing to work with the Court and the private bar to improve the efficient disposition of cases before the Court and to enhance the litigation experience for all taxpayers appearing before the Court. Please do not hesitate to contact me if you desire any additional information or wish to discuss our comments and recommendations in further detail.

Sincerely,

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

cc: Mary A. McNulty
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November 13, 2006

Mr. Robert R. Di Triolio
Clerk of the Court
U.S. Tax Court
400 2nd St., N.W., Room 111
Washington, D.C. 20217

RE: Comments Concerning the Proposed Amendment to Rule 173

Dear Mr. Di Triolio:

The following submission is made on behalf of the Section of Taxation[1] of the American Bar Association in response to the United States Tax Court's ("Court") request for public comment on its proposed revisions to the United States Tax Court Rules of Practice and Procedure, Rule 173. The views expressed in this letter have not been approved by the Board of Governors or the House of Delegates of the American Bar Association and should not be construed as representing the policy of the American Bar Association.

Discussion

The Section endorses the Court's efforts to assist small tax case ("S-case") petitioners—many of whom are unrepresented low income taxpayers—by requiring the Commissioner to file an answer in each S-case which identifies the name, address and telephone number of the Counsel attorney responsible for the case. This revision to the rule will improve pre-trial communication between petitioners and respondent and will encourage early consideration of each S-case by the responsible Counsel attorney. The revised rule will also promote earlier identification of procedural and jurisdictional issues, as well as identifying S-cases more appropriate for disposition in a regular case proceeding.

In connection with its proposed revisions to Rule 173, the Court may wish to consider that some unrepresented taxpayers may be confused by receipt of an answer and may file a reply without being ordered to do so by the Court. Such a reply may not be captioned as such. Indeed, it may simply be a letter mailed directly to Counsel and/or the Court that responds to certain statements contained in the answer. In such a case, the Section recommends that the Court implement a procedure suggested by Rule 23(g): Specifically, if such a reply is sent to the court, the Clerk's office should return the reply, unfiled, to the S-case petitioner and explain that a reply may not be filed unless ordered by the Court. The

[1] Principal responsibility for these comments was exercised by Mark Allison, Joshua D. Odintz, Elizabeth A. Copeland, Peter A. Lowy and Mary A. McNulty, members of the Court Procedure and Practice Committee of the Section of Taxation of the American Bar Association and Danshera Cords, Kathryn V. Sedo, Susan E. Morgenstern, and Brian P. Trauman, members of the Pro Bono Committee of the Section of Taxation; and reviewed by Karen L. Hawkins on behalf of the Section of Taxation's Committee on Government Submissions; and Charles A. Pulaski, Jr., Council Director for the Court Procedure and Practice Committee.

Clerk's office should also explain that, in such a case, all affirmative allegations contained in the answer are automatically deemed to be denied. In addition, as a preventative measure, the Court may wish to consider sending a letter to the petitioner in each S-case, at the time the answer is originally filed, stating that no reply should be filed unless ordered by the Court. If a certificate of service is not included with Counsel's answer, this letter can accompany the service made by the Clerk of the Court. If a certificate of service is included with the answer, the letter can be sent by the Clerk upon filing of the answer.

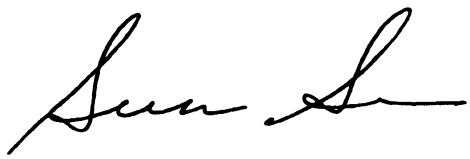
Another concern of the Section is that some S-case petitioners who are ordered by the Court to file a reply may not appreciate that, by virtue of current Rule 173(c), which cross-references to Rule 37(b), any affirmative allegations contained in the answer will be deemed to be admitted unless expressly denied. For this reason, the Section recommends that Rule 173(c) be modified to provide that, in any case in which a reply is filed, any affirmative allegation contained in any answer that is not specifically addressed in the reply is deemed to be denied for all purposes. Accordingly, the Court may wish to consider revising Rule 173(c) to read as follows:

> **(c) Reply:** A reply to the answer shall not be filed, unless the Court otherwise directs. Any reply filed pursuant to the Court's order shall conform to the requirements of Rule 37(b). Where a reply is filed, the provisions of Rule 37(c) shall not apply. Every affirmative allegation set out in the answer and not expressly admitted or denied in the reply shall be deemed to be denied.

Overall, the Section believes that the Court's efforts to address the needs of small case taxpayers are admirable and timely and that the proposed revisions to Rule 173 will facilitate more timely resolution of small tax cases.

Any questions regarding these comments may be directed to Elizabeth Copeland, c/o Oppenheimer, Blend, Harrison & Tate, Inc., 711 Navarro, Sixth Floor, San Antonio, Texas 78205, 210-299-2347.

Sincerely yours,



Susan P. Serota
Chair, Section of Taxation

DENNIS
& ASSOCIATES, P.C.
Certified Public Accountants

November 13, 2006

Mr. Robert R. Di Trolio
(f) (202)-521-4567 with hard copy to follow
Clerk of the Court
U. S. Tax Court
400 Second St., NW, Room 111
Washington, DC 20217

Dear Mr. Di Trolio:

I am writing to comment on the proposed amendment to Tax Court Rules requiring the Commissioner to file an answer in all "S" cases. While I believe this rule change is well intentioned, I believe it will have the effect of limiting the ability to settle docketed "S" cases.

In many "S" status Tax Court cases, the taxpayer has received a Notice of Deficiency and the case has not gone to Appeals. The taxpayer files a Tax Court petition (often in the final days) just to preserve their rights to appeal.

As your rulemaking notice mentions, in most cases, the Commissioner does not respond. These cases are immediately sent to Appeals, and since they are docketed cases, they are given a priority status by Appeals and do not languish. They are given a "fresh look" by Appeals. Appeals reports an 85% "customer satisfaction" rate in settling cases. Therefore, the vast majority of these cases do not return to Tax Court except for the purposes of a judge signing off on the proposed settlement the parties have reached.

I have experienced as a representative a small number of cases in Appeals where the Commissioner has drafted a response. In each of these cases, the Appeals Officer felt circumscribed in his ability to settle the case. He felt obliged to follow the "Commissioner's lead" in the Answer in settling the case.

Unfortunately, while your proposed rule making anticipates a thoughtful Answer from the Commissioner, I think the vast majority of Answers in "S" cases will be rather cursory wherein the Commissioner will not make any admissions and will simply deny all the petitioner's claims.

I think requiring an un-appealed case to have this "stamp" on it when it arrives at Appeals will hurt not help settlements. As a specific example, we were trying to settle a case recently and claimed that the penalties should be abated (or not assessed) due to reasonable cause. Since the Commissioner had already stated in their Answer that the

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penalties should not be abated due to reasonable cause, the Appeals Officer felt circumscribed in his ability to settle the case since the Commissioner had already opined on the penalties.

In addressing the concerns of many Low Income Taxpayer Clinics, I would offer several alternatives to the proposed rulemaking. Each of these alternatives, fully address the LITC issues, result in less work for the Commissioner, and keep the taxpayer's opportunities to settle a case fully maximized.

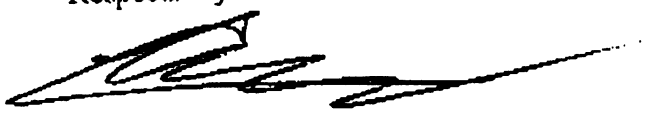
Option "1A"--Allow a motion from petitioner in an "S" case to require an Answer from the Commissioner. This could be done at virtually any time in the life of the case.

Option "1B"—Have a "check the box" option on the Court Petitions wherein the the petitioner can elect "S" case status (current practice) and in a second box can elect to request an Answer by the Commissioner.

Option 2—I am not sure mechanically how this would work, but I would suggest amending the proposed rule to apply only to "S" cases that have already been through IRS Appeals. These cases do warrant the District Counsel's attention, and I agree the Commissioner should be required to Answer these "S" cases.

I hope you will consider these concerns as you consider this change in your rules. All of my proposed options will reduce the amount of District Counsel work and require their Answers in only those cases where the petitioner is actively seeking to identify District Counsel which was the real concern addressed by the proposed rule changes.

Respectfully Submitted,



Charles R. Markham, MST, EA