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
(Procedure & Administration)

cc: Peter A. Lowry
Chair, Court Procedure & Practice Committee
ABA Section of Taxation

SECTION OF TAXATION
State Bar of Texas

February 27, 2012

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

RE: Proposed Amendments to the Rules of the United States Tax Court

Dear Mr. Di Trolio:

On December 28, 2011, the United States Tax Court (the "Court") announced proposed changes to its rules of practice and procedure. The Court requested comments on the proposed changes by February 27, 2012. On behalf of the Section of Taxation of the State Bar of Texas, I am pleased to submit the following comments on the proposed changes.

THE COMMENTS ENCLOSED WITH THIS LETTER ARE BEING PRESENTED ONLY ON BEHALF OF THE SECTION OF TAXATION OF THE STATE BAR OF TEXAS. THE COMMENTS SHOULD NOT BE CONSTRUED AS REPRESENTING THE POSITION OF THE BOARD OF DIRECTORS, THE EXECUTIVE COMMITTEE OR THE GENERAL MEMBERSHIP OF THE STATE BAR OF TEXAS. THE SECTION OF TAXATION, WHICH HAS SUBMITTED THESE COMMENTS, IS A VOLUNTARY SECTION OF MEMBERS COMPOSED OF LAWYERS PRACTICING IN A SPECIFIED AREA OF LAW.

THE COMMENTS ARE SUBMITTED AS A RESULT OF THE APPROVAL OF THE COMMITTEE ON GOVERNMENT SUBMISSIONS OF THE SECTION OF TAXATION AND PURSUANT TO THE PROCEDURES ADOPTED BY THE COUNCIL OF THE SECTION OF TAXATION, WHICH IS THE GOVERNING BODY OF THAT SECTION. NO APPROVAL OR DISAPPROVAL OF THE GENERAL MEMBERSHIP OF THIS SECTION HAS BEEN OBTAINED AND THE COMMENTS REPRESENT THE VIEWS OF THE MEMBERS OF THE SECTION OF TAXATION WHO PREPARED THEM.

We commend the Court for the time and thought that has been put into preparing the proposal, and we appreciate being extended the opportunity to participate in this process.

Respectfully submitted,

Mary McNulty
Chair, Section of Taxation
The State Bar of Texas

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COMMENTS ON PROPOSED AMENDMENTS TO THE RULES OF THE UNITES STATES TAX COURT, AS SET FORTH IN RELEASE NOTICE 2011-62 ISSUED ON JULY 19, 2011

Principal responsibility for drafting these comments was exercised by Robert D. Probasco. The Committee on Government Submissions (COGS) of the Section of Taxation of the State Bar of Texas has approved these comments. Elizabeth Copeland reviewed the comments and made substantive suggestions on behalf of COGS. Stephanie Schroepfer, the Chair of COGS, also reviewed the comments on behalf of COGS.

Although members of the Section of Taxation who participated in preparing these Comments have clients who would be affected by the principles addressed by these Comments or have advised clients on the application of such principles, 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 27, 2012

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We commend the Court for the time and thought that has been put into preparing the proposed amendments to its rules of practice and procedure. We also appreciate the opportunity to comment on the proposal and hope that our comments prove to be helpful. We agree with the proposed rules for the most part and believe that they represent an improvement for taxpayers, practitioners, and the Court. We respectfully suggest, however, the Court consider certain changes that we believe could further improve the procedures.

Privacy Protection For Whistleblower Actions

Proposed Rule 345

The protection of privacy in whistleblower actions is a difficult issue. As discussed in *Whistleblower 14106-10W v. Commissioner*, 137 T.C. No. 15 (2011), our system has a tradition of protecting individuals' privacy during administrative proceedings but reducing that protection in judicial proceedings. A party seeking judicial review, whether a whistleblower challenging the denial of an award or a taxpayer challenging a notice of deficiency, must balance the advantages of judicial review against the disadvantages of public disclosure. The public's right to information concerning judicial proceedings, however, is not complete in either situation. We therefore concur that it is appropriate to formalize the procedures for whistleblowers to seek anonymity and that anonymity will often be appropriate.[1]

We are concerned, however, about the level of protection for the privacy of the taxpayer in a whistleblower case. Proposed Rule 345(b) provides for the redaction of information that might identify the taxpayer to whom the claim relates. We believe such a change would significantly improve the Court's rules. As pointed out by National Taxpayer Advocate Nina Olson, the taxpayer in a whistleblower case is not a party and cannot choose judicial review over the risk of disclosure. It is, therefore, appropriate to protect his/her or its privacy. However, proposed Rule 345(b) may be less effective than desirable because protection of the taxpayer's identity is left up to the discretion of the Court. The taxpayer is almost always a better judge of what information might disclose his/her or its identity. Proposed Rule 345(b) provides the taxpayer in a whistleblower action with no opportunity for input concerning what information should be protected. The proposal states that "it is contemplated that the trial judge would have discretion to direct that prior notice be provided to the nonparty taxpayer." In effect, however, this establishes "no notice" as the default rule unless the Court determines otherwise.

Although it may not always be feasible to provide the taxpayer an opportunity to review filings and request redaction of additional information, we believe such an opportunity should be afforded the taxpayer, whenever possible. We encourage the Court to consider amending the rules accordingly. For example, the rules could provide for the notification of the taxpayer of commencement of the case and the automatic sealing of filings for the case for a limited time to allow the taxpayer an opportunity to review them and request additional redactions as necessary to preserve privacy. Although such a rule would impose an administrative burden, it would affect a relatively small number of cases, and we believe the importance of taxpayer privacy justifies the burden.

[1] We also encourage the Court to consider further changes to formalize the procedures for taxpayers in deficiency actions to proceed anonymously, where such anonymity is warranted.

We further suggest that the taxpayer should have another opportunity to be heard before the Court concludes "that the public's interest in knowing the nonparty taxpayer's identity was sufficiently great that the nonparty taxpayer's name should no longer be protected." In general, we believe that the balance of policy considerations will rarely, if ever, justify such disclosure of the taxpayer's identity. Taxpayers often agree to assessment of substantial tax liabilities, and even if the assessments resulted from a whistleblower's actions, the taxpayer's identity is generally protected under Section 6103 of the Internal Revenue Code. That could change under the proposed rule simply because the Internal Revenue Service and the whistleblower did not agree as to an award and the whistleblower sought judicial review. Such a dispute, however, adds little or no additional justification for disclosing the taxpayer's identity. We therefore suggest that the proposed rule or associated commentary incorporate a statement that, in deciding whether to disclose identifying information about the taxpayer, the Court give appropriate weight to the taxpayer's privacy rights inherent in Section 6103.

Mandatory Electronic Filing

Proposed Rule 26

In the interests of efficient administration, we support the Court's requirement that most represented parties file papers with the Court electronically. We further support the exceptions for self-represented petitioners and counsel who file a motion to allow paper filing for good cause. These provisions will, in our opinion, cover most circumstances where this requirement should be relaxed. We suggest, however, that the Court consider a further change concerning practitioners with low-income taxpayer clinics or Bar-sponsored pro bono programs. In most instances, these practitioners only assist the petitioners without making an actual appearance. In such cases, proposed Rule 26(b)(2) would apply and mandatory electronic filing would not apply. If these practitioners do make an appearance, however, they would be subject to the mandatory electronic filing requirement. The Court's proposal suggests that, if good cause exists, these practitioners could file a motion for exception under proposed Rule 26(b)(3).

We believe that this approach may be unduly cumbersome in some instances. Some volunteers for these programs may not have registered yet for eAccess with the Court. They might be discouraged from entering an appearance for a petitioner by the need to either register or file a motion for exception, with no guarantee that the motion would be granted. An automatic exception from the requirement, tied to the entry of appearance, could avoid this problem. Accordingly, we suggest that the Court consider revising the rule by adding an exception under proposed Rule 26(b) for "counsel who enter an appearance in a case and state in their entry of appearance that they are doing so as part of a low-income taxpayer clinic or Bar-sponsored pro bono program." We anticipate that most practitioners who are already registered for eAccess will wish to use it, despite the automatic exception. Others might register but would have the flexibility to proceed without doing so if they wished. We believe that such a practice would serve the best interests of taxpayers, practitioners, and the Court by encouraging practitioners not only to participate in such clinics and pro bono programs but also to enter appearances for petitioners when appropriate.

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TAXATION
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March 1, 2012

Mr. Robert R. Di Trolio
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Washington, D.C. 20217

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 28, 2011.[1] The proposed amendments include modifications and conforming changes concerning the Court's filing rules, the work product doctrine, discovery of expert witness materials, Rule 155[2] computations, and privacy protections in whistleblower cases. 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 of 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 formalize the work product doctrine and the Court's electronic filing requirements. We believe that the proposed rule concerning privacy in whistleblower cases furthers the Court's efforts to safeguard private and identifying information. The following are the Section's comments and suggestions, which may assist the Court in refining the proposed amendments.

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1 Principal responsibility for these comments was exercised by Mark D. Allison, Vice-Chair of the Section's Committee on Court Procedure and Practice (the "Committee"). Substantive contributions were made by Sean Akins, Mark D. Allison, Mitchell Horowitz, Peter Lowy (Chair), Rachel Partain, Christopher S. Rizek (Immediate Past Chair), and Juan F. Vasquez, Jr. of the Committee. These comments were also reviewed by Christopher S. Rizek on behalf of the Section of Taxation's Committee on Government Submissions and by Miriam Fisher, 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 28, 2011, Tax Court Press Release announcing the proposed amendments, available at: http://www.ustaxcourt.gov/press/122811.pdf.

Conforming the Tax Court Rules to the Federal Rules of Civil Procedure

The notice proposes amendments to several of the Tax Court's rules to conform them to the Federal Rules of Civil Procedure. The rules that would be amended for this reason are Tax Court Rules 70, 143, and 121.

In general, the Section strongly supports bringing the Tax Court's rules into closer conformity with the rules applicable in the United States District Courts, another forum in which tax cases may be heard. Reducing or eliminating the differences between the rules applicable in the different forums may provide benefits to all parties and the Tax Court, such as providing parallel sources of law applicable to procedural disputes or even reducing procedural-driven forum shopping considerations by taxpayers. We therefore approve of the Court's efforts to achieve additional conformity with the Federal Rules of Civil Procedure.

At the same time, the Section is concerned that much may be read into any minor differences between the rules applicable in the District Courts and the Tax Court. An example is the proposal to amend Tax Court Rule 70 by adding new paragraph 70(c)(3)(A) regarding work product protection. The Court's explanation states that the aim of this amendment is "to formalize the Court's application of the work product doctrine" and "to provide the same protections from discovery as does rule 26" of the Federal Rules of Civil Procedure. The proposed new paragraph, however, does not include a parenthetical phrase that is in Rule 26, which describes protected work product as communications by or for a party "or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent)." The Court may believe that the parenthetical is unnecessary, perhaps because questions regarding the work product protection applicable to communications with such persons as "sureties, indemnitors, insurers, or agents" rarely arise in the tax cases it hears. But that rationale would not explain the omission of communications with a party's "attorney" or "consultant." More generally, the elimination of the entire parenthetical will inevitably raise the question whether such communications are indeed afforded "the same protection from discovery" as under Rule 26.

The Section is not suggesting that the Court must slavishly conform every word of its rules to the Federal Rules of Civil Procedure. We do, however, recommend that any deviations be explained if the overall effort is to achieve general conformity.

The Section has the following additional specific comments on this portion of the proposed rule changes:

Proposed Rule 70. Subject to the foregoing comment about the exclusion of the parenthetical describing work product, we support the proposed changes to Rule 70 to bring them into closer conformity with Fed. R. Civ. P. 26. The Section urges the Court to include the parenthetical or to state clearly that no differences in the scope of the work product doctrine are intended by exclusion of the parenthetical.

Proposed Rule 143. Except for minor stylistic changes, the principal change the Court proposes is to enumerate the required contents of an expert witness report, using the same elements set forth in Fed. R. Civ. P. 26(a)(2)(B). The Section endorses this change in the Tax Court's rules as well. The Section notes that the language of Proposed Rule 143(g)(1) regarding the contents of the expert report, however, does not reflect the Court's practice of having the expert report serve as the direct testimony of the expert witness pursuant to Rule 143(g)(1) (and Proposed Rule 143(g)(2)). For example, Proposed Rule 143(g)(1)(A) and (C) indicates that an expert report must contain "a complete statement of all opinions

the witness *will* express" and "any exhibits that *will be* used . . . " (*emphasis added*). We suggest that describing the required contents of an expert witness report in the present tense, rather than the future tense, may be more consistent with the Court's practice and requirements.

Proposed Rule 121. The Court proposes to amend Rule 121 to bring it into closer conformity with the most recent changes to Fed. R. Civ. P. 56 regarding summary judgment, and proposes several other minor changes. The Section has the following specific comments with respect to the proposed amendments to Rule 121.

Proposed Rule 121(a) tracks prior Rule 121(a) nearly verbatim, with only two minor variations. One minor variation is to permit "declarations" as well as affidavits to be used to support a summary judgment motion. This change acknowledges that a written unsworn declaration, certificate, verification, or statement subscribed in proper form as being true under penalty of perjury is an acceptable alternative to a formal affidavit for purposes of a motion for summary judgment. As the Court notes elsewhere, this is already provided by federal law (under 26 U.S.C. § 1746). The Court proposes the same technical change throughout Rules 121(b), 121(d), 121(e), and 121(f). The Section supports these changes and believes that these proposed amendments will reduce the burden on parties filing a motion for summary judgment who might not have immediate access to a notary public. We also suggest that, for consistency's sake, the word "affiant" in the first sentence of Rule 121(d) be changed to "affiant or declarant."

The other variation in Rule 121(a) is to require that a summary judgment motion be filed at least 60 days before the first day of the trial calendar session in which the trial is scheduled. This proposed rule appears to be intended to prevent motions from being made "at the last minute," to give the parties sufficient time to brief the motion fully before the calendar, and to let the Court know that the case can accordingly be removed from the calendar. Sixty days before the calendar appears to be an appropriate time to accomplish these objectives, and thus we support this change to Rule 121(a).

The Court also proposes to amend Rule 121(b) to reflect the new language of Fed. R. Civ. P. 56 requiring that there be no genuine "dispute" as to any material fact (rather than the former phrase, no genuine "issue"). The Court's explanation notes that this change is not intended to change the standard for summary judgment, and with that important condition we support it. The Section agrees that the term "genuine dispute" better reflects the focus of a summary judgment determination. The Section respectfully suggests, however, that the Court clarify and confirm that the substitution of terms is not intended to substantively alter the operation of Rule 121 or alter any decisional law that construes or applies either of the terms. We note that the penultimate sentence of Rule 121(b) still uses the phrase "genuine issue for trial," and suggest that "genuine dispute" may be more appropriate for consistency.

Finally, the Section respectfully suggests that the Court revise Rule 121(b) to add a sentence immediately prior to the last sentence of the paragraph stating that "The court should state on the record the reasons for granting or denying the motion." The Section believes that such a requirement will help focus and facilitate any appeal or subsequent trial proceedings and will bring Rule 121(b)'s text into closer conformance with the Federal Rules of Civil Procedure.

Computations by Parties for Entry of Decision
Proposed Rule 155

The Section endorses the Court's proposal to clarify the scope of Rule 155 to confirm that it applies to dispositive orders, as well as to deficiency, liability, and all other actions over which the Court

has jurisdiction. This change should make clear that, in any action pending before the Court for which a final resolution is achieved through Court action, the parties in that action can file computations under Rule 155 for entry of decision.

However, the Section respectfully suggests that there is an ambiguity in the last sentence of Rule 155(b). That sentence currently reads (and will also so read under the proposed amendments) as follows:

> If in accordance with this Rule computations are submitted by the parties which differ as to *the amount* to be entered as the decision of the Court, then the parties may, at the Court's discretion, be afforded an opportunity to be heard in argument thereon and the Court will determine *the correct amount* and will enter its decision accordingly. (*emphasis added*).

This language could be construed as providing for something akin to baseball arbitration, where the parties present their salary demands and arguments and the arbitrator selects one or the other. The Section believes that there likely are circumstances where the parties can differ as to their computations, but the Court does not believe either computation is fully in accordance with the Court's opinion or dispositive order in the case. In such circumstances, the language in the last sentence of Rule 155(b) should clarify that the Court has more flexibility and can determine which aspects of each party's Rule 155 computations should be accepted (or determine that neither is correct and that some other computation should apply), and then enter an appropriate order directing the parties to re-compute the amount in accordance with the Court's order.

Notice by Tax Matters Partners
Proposed Rule 241

The Section understands the Court's desire to conform the notice periods in Rule 241(f) applicable to tax matters partners with the 30-day period in which a tax matters partner must provide notice of the filing of a petition under sections 6226 or 6228 to the other partners under Treasury Regulation § 301.6223(g)-1(b)(1)(vii) and (3).

The Section suggests that, in its explanation of the amendment to Rule 241(f), the Court consider encouraging tax matters partners to provide notice to the other partners without delay where possible. Because there are time periods for specific actions under the Rules that commence with the service of a petition by the Tax Court Clerk on the Commissioner (including specifically motions for leave to file notice of elections and amendments to the petition), the tax matters partner should provide notice of the filing of a petition under sections 6226 or 6228 to each partner as promptly as possible. Otherwise, the other partners in a partnership may feel compelled to monitor the Tax Court's docket and to submit a request to the tax matters partner for a copy of any petition filed, in order to obtain the petition more promptly.

The Court has indicated that it will liberally grant Rule 246(c) motions for leave to file notices of election to participate out of time, where appropriate. We note that authorized parties may file an amendment to the petition under Rule 246(e) within 90 days of the date that the petition is served by the Tax Court Clerk on the Commissioner. Since such amendments are similar to notices of election to participate, the Section suggests that the Court consider being equally liberal in allowing motions for leave to file amendments to the petition out of time, where appropriate under the circumstances.

Whistleblower Privacy Protections
Proposed Rule 345

The Section endorses the Court's proposal to protect the confidentiality of certain information regarding parties and nonparties in whistleblower actions. We recognize that there are competing considerations that must be balanced. For instance, the Court must weigh the public interest in knowing the whistleblower's identity versus the potential harm from disclosing such person's identity as a confidential informant, and likewise balance the public's need to obtain valuable precedent in whistleblower actions against the confidentiality interests of a nonparty who is not privy to the action but whose identifying information should remain private and protected. Protecting a nonparty's identity may be as defensible as protecting the nonparty's tax return information, trade secrets, and other confidential information, which the Court is authorized to do under section 7461(b)(1). We believe that the Court's proposal adequately and effectively balances these many competing interests. The Section suggests, however, that the Court consider including in Proposed Rule 345(a) a clear standard under which the Court will grant a petitioner's motion to proceed anonymously in a whistleblower action. A clear standard would allow a potential whistleblower petitioner to evaluate the risk that the Court may deny his motion to proceed anonymously.

The Section respectfully suggests that the Court make explicit in Proposed Rule 345(b) that, pursuant to its authority under section 7461(b)(1), the Court may, on its own motion, redact certain words, phrases, or paragraphs of a filing to conceal the name, address, or other identifying information of a party or nonparty. The Section suggests that the Court consider whether a taxpayer to whom a whistleblower claim relates should be notified of the action and provided with an opportunity to intervene for the limited purpose of requesting redactions.

The Section also endorses the flexibility provided in the proposed rule to allow for certain confidentiality restrictions to be lifted as justice so requires.

Other

To the extent not specifically addressed above, the Section commends the Court on the proposed amendments, deletions and conforming changes to its Rules and commends the Court on formalizing the Court's electronic filing requirements.

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Overall, the Section commends the Court on the proposed amendments to its Rules. The Section believes that the Court's efforts to conform its Rules to the Federal Rules of Civil Procedure are laudable. Further, the Court's proposed rule with respect to whistleblower cases reflects the different types of taxpayers that appear before the Court and appropriately addresses the privacy concerns of both whistleblowers and taxpayers.

Questions regarding these comments may be directed to Mark D. Allison at mallison@capdale.com or (212) 319.8710. Thank you for your consideration.

Sincerely,

William M. Paul
Chair, Section of Taxation