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Office of
Chief Counsel

Notice

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September 13, 2012

Amendments to United States Tax
Court Rules of Practice and

Subject: Procedure

Cancel Date: 09/13/2013

BACKGROUND

On July 6, 2012, the United States Tax Court adopted amendments to its Rules of Practice and Procedure. The text of the amendments can be found on the Tax Court's website at <http://www.ustaxcourt.gov/notice.htm>. A press release explaining the amendments is available at <http://www.ustaxcourt.gov/press/070612.pdf>. The most significant changes are new restrictions on discovery relating to expert witnesses, the adoption of new Rule 345 to provide privacy protections in whistleblower cases, and the recognition that documents requiring support of a formal affidavit may also be supported with an unsworn written declaration under penalties of perjury. The court also amended Rule 26 to formalize the electronic filing requirement for practitioners. Many of the changes are designed to bring the Tax Court Rules into greater conformity with the Federal Rules of Civil Procedure.

In general, the amendments to the rules became effective July 6, 2012. The amendments to Rule 26 apply to cases in which the petition was filed on or after July 1, 2010.

DISCUSSION

1. Number of Copies Filed, Font Requirements, and Return of Papers – Rules 23 and 175

In light of the successful transition to eFiling, the court amended Rule 23(b) to require documents to be filed in paper form in unconsolidated cases to include only the original and one conformed copy, except as otherwise provided under the rules. For instance, under Rule 151(d), briefs filed in paper form should continue to include the original and two copies plus an additional copy for each additional person to be served. When filing a document in paper form in a consolidated case, the number filed should include one additional copy for each additional docket. Additionally, Rule 175, with respect to small tax cases, was deleted to conform to amended Rule 23(b).

The court amended Rule 23(d) to eliminate the requirement that documents use 12-point type produced by nonproportional, fixed-width fonts such as Courier. The court will now accept

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documents using 14-point type produced by proportional fonts such as Times New Roman in addition to 12-point type produced by a nonproportional font. Chief Counsel attorneys should generally continue to use 12-point Courier when filing documents with the court.

The court modified Rule 23(g) to prohibit the Clerk from refusing to file a paper solely because it is not in the form prescribed by the court's rules. This amendment conforms Rule 23(g) to Fed. R. Civ. P. 5(d)(4) and addresses the concerns raised by the Third Circuit in Urtekar v. Commissioner, 302 Fed. Appx. 64, 66-67 (3d Cir. 2008). In this case, the Court of Appeals found the Tax Court abused its discretion in refusing to file an improperly captioned motion to vacate that would have been timely under Rule 162 if accepted by the court. Under modified Rule 23(g), judges retain the discretion to refuse to file documents that do not conform to the rules.

2. Mandatory eFiling for Most Represented Parties – Rule 26

Rule 26 has been amended to formalize the court's eFiling requirements previously set forth in the announcement of the court dated May 6, 2010. Under amended Rule 26(b), electronic filing is required for all eligible papers filed by parties represented by counsel. Pro se petitioners, including pro se petitioners who are assisted by low-income taxpayer clinics and Bar-sponsored pro bono programs, are not required to eFile. Under Rule 26(b)(3) an exception from the eFiling requirements by counsel may be made upon a motion filed in paper form demonstrating good cause.

Consistent with the court's May 6, 2010 announcement, the eFiling requirement formalized in Rule 26 is effective for cases filed after July 1, 2010. Practitioners who previously filed a Notice to Be Exempt from eFiling in a case pursuant to the court's earlier announcement are not required to file a motion under Rule 26(b)(3) for an exception from the electronic filing requirement.

3. Protection for Trial Preparation Materials and Draft Expert Reports – Rule 70

The court reorganized and revised the content of Rule 70 concerning discovery. Amended Rule 70(b) defines the general scope of discovery. Amended Rule 70(c) sets forth the limitations on discovery that previously appeared in Rule 70(b)(2). The court added paragraph 70(c)(3) to formalize the court's application of the work product doctrine set forth in Fed. R. Civ. P. 26(b)(3). Under Rule 70(c)(3), a party may not discover materials prepared in anticipation of litigation unless the materials are otherwise discoverable under Rule 70(b) and the party shows a substantial need for the materials to prepare its case without undue hardship. The adoption of Rule 70(c)(3) is consistent with the court's previous application of the work product doctrine.

The court also added Rule 70(c)(4) to provide 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. New Rule 70(c)(4)(A) protects from discovery all drafts of expert witness reports, regardless of the form in which the draft reports are recorded. Rule 70(c)(4)(B) protects from discovery communications between a party's counsel and any expert witness except to the extent the communication relates to the compensation for the study or testimony, identifies facts or data provided by counsel and relied upon by the expert in forming the opinions expressed, or identifies assumptions provided by a party's counsel and relied on by the expert in forming the opinions expressed. Rule 70(c)(4)(C) protects from discovery all communications with an expert who is retained in anticipation for litigation or preparation for trial but is not expected to be called as a witness except on a showing of exceptional circumstances that the facts or opinions cannot be obtained through other means.

The Office of Chief Counsel opposed the adoption of Rule 70(c)(4) given the unique use of expert witness reports in Tax Court proceedings as direct trial testimony and the potential for abuse in the drafting of expert reports. Attorneys should be cognizant of the potential for undue attorney influence in the drafting of reports. Rule 70(c)(4)(B)(ii) and (iii) do allow discovery of the facts and data and assumptions provided to the expert by an attorney and considered by the expert in forming an opinion. Further, amended Rule 70(c)(4) does not prohibit a party from questioning experts at trial on the same information and communications that are protected in discovery. For instance, when appropriate, counsel may cross examine or voir dire an opposing expert witness in depth on any revisions the opposing party's counsel suggested to the offered expert report.

4. Expert Witness Reports – Rule 143

In conjunction with the court's limitations on expert discovery, the court amended Rule 143(g) to expand the information required to be included in expert reports, consistent with Fed. R. Civ. P. 26(a)(2)(B). Amended Rule 143(g) now requires that an expert witness report must include:

- (1) a complete statement of all opinions the witness expresses and the basis and reasons for them;
- (2) the facts or data considered by the witness in forming the opinions;
- (3) any exhibits used to summarize or support the witness's opinions;
- (4) the witness's qualifications, including a list of all publications authored in the previous 10 years;
- (5) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and
- (6) a statement of the compensation paid for the study and testimony in the case.

Amended Rule 143(g) is effective as of July 6, 2012. Any expert reports that were prepared prior to the July 6th effective date of modified Rule 143(g) should be carefully reviewed to ensure that the information now required by the rule is included in the report. Expert reports prepared after the effective date should also be reviewed to ascertain whether they contain the required information.

5. Summary Judgment – Rule 121

Rule 121(b) has been amended to conform to the revised terminology of Fed. R. Civ. P. 56(a) that summary judgment may be granted when there is no "genuine dispute" as to a material fact as opposed to a "genuine issue" as to a material fact. The court substituted "dispute" for "issue" to reflect the focus of a summary judgment determination. This amendment, as with revisions to Fed. R. Civ. P. 56(a), is not intended to alter substantively the operation of Rule 121 or to affect the continuing development of the decisional law applying Rule 121.

Additionally, Rule 121(d) was amended to permit the use of unsworn declarations in support of motions for summary judgment. The unsworn declarations must be subscribed under the penalty of perjury consistent with 28 U.S.C. § 1746. Conforming amendments allowing the use of declarations were also made with respect to filings made under Rules 20, 33, 57, 143, 173, 231, 232, 271, and 281. The court adopted new Form 18, Unsworn Declaration Under Penalty of Perjury, for use with such declarations.

6. Computations with Dispositive Orders – Rule 155

The court often issues dispositive orders resolving a case upon a party's motion or a concession without issuing an opinion. Rule 155(a) was amended to clarify that Rule 155 computations may be filed following the issuance of dispositive orders in addition to opinions determining the issues in a case.

7. Notice by the Tax Matters Partner of the Filing of a Petition – Rule 241

Amended 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 sections 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. This amendment brings Rule 241(f) into conformity with the 30-day notification time period contained in Treas. Reg. § 301.6223(g)-1(b)(3).

8. Privacy Protections in Whistleblower Actions – Rule 345

New Rule 345(a) was adopted to provide that a petitioner in a whistleblower case may move for permission to proceed anonymously, if appropriate. A petitioner seeking to proceed anonymously under Rule 345(a) must file with the petition a motion, with or without supporting declarations, setting forth a sufficient, fact-specific basis for anonymity. Upon the filing of the motion, the court will temporarily seal the petition and other filings pending a ruling on the motion.

New Rule 345(b) provides that the name, address, and other identifying information of the taxpayer to whom a whistleblower claim relates must be redacted from, or not included in, electronic or paper filings. A party or nonparty filing a redacted document in a whistleblower action must also file under seal a reference list that identifies the redacted information. The reference list may be amended as of right and may be unsealed at the discretion of the court.

Rule 345 does not address taxpayer information that may be disclosed in a Tax Court appeal of a whistleblower award determination. In separate letters submitted to the Tax Court on March 1, 2011 commenting on proposed Rule 345, the Associate Chief Counsel (Procedure and Administration) and the National Taxpayer Advocate expressed concerns regarding the public disclosure of nonparty taxpayer information in whistleblower award cases. In the explanation accompanying Rule 345 as finalized, the court states that section 7461(b)(1) provides ample authority for the court to protect the confidential information of nonparty taxpayers in whistleblower award cases, including section 6103 return information. Rule 345, however, does not require that confidential taxpayer information be sealed or otherwise protected in whistleblower award cases. Instead, the court stated it will address the need to protect nonparty taxpayer information on a case-by-case basis.

Section 6103(h)(4) may permit the disclosure of nonparty taxpayer information to a petitioner in a whistleblower award case during discovery, but neither a petitioner nor petitioner's attorneys are under any duty not to further disclose that information once it has been produced to them. Attorneys must be mindful that a nonparty taxpayer generally will have no control over information disclosed in a whistleblower award case that is petitioned to the Tax Court. Strict attention must be paid to the limitations on discovery set forth in Rule 70(b)(1), which protects from discovery both matters that are privileged as well as matters not relevant to the pending case. Any information that potentially may be responsive to a petitioner's discovery request in a whistleblower award case must be reviewed for claims of privilege and relevancy; a request for

information that is privileged or that is not relevant to the case must be objected to and such information should not be produced in discovery or at trial. In appropriate circumstances, consideration should be given to seeking a protective order under Rule 103 to prevent redisclosure of nonparty taxpayer information that is produced in discovery or at trial in whistleblower award cases. Any proposed motion for protective order must be approved by the Associate Chief Counsel (Procedure and Administration) pursuant to Chief Counsel Notice 2004-005.

9. Conforming Amendments

The court made conforming amendments to various rules to implement the court's modified procedures with respect to the number of copies required, redesignation of Rule 70(b)(2), and the allowance of unsworn written declarations in lieu of affidavits.

Questions regarding this Notice should be directed to Procedure and Administration, Branch 6 at (202) 622-7950 or Branch 7 at (202) 622-4570, respectively.

 /s/

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